83-1283

No. ___

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

HARRY TOUSSAINT ALEXANDER, A Member of the Bar of the District of Columbia Court of Appeals,

Petitioner,

v.

BOARD ON PROFESSIONAL RESPONSIBILITY of the District of Columbia Court of Appeals,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

JEWEL LAFONTANT*
EUGENE B. GRANOF
LESTER R. GUTMAN
Vedder, Price, Kaufman,
Kammholz & Day
1919 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 828-5040

*Counsel of Record

QUESTIONS PRESENTED

1. Whether in a quasi-criminal proceeding which results in disciplinary action against a member of the Bar, the Due Process Clause permits a court to suspend an attorney from the practice of law merely on the basis of substantial evidence?

2. Whether, in the instant case the evidentiary basis for ordering Petitioner to be suspended from the practice of law for 90 days was so inadequate that such a suspension would effectively deprive Petitioner of liberty or property without the due process of law mandated by the Fifth Amendment.

PARTIES

The parties to the proceeding in the District of Columbia Court of Appeals -- the court whose judgment is sought to be reviewed -- were:

Harry Toussaint Alexander, a member of the Bar of the District of Columbia Court of Appeals (Petitioner herein)

and

Board on Professional Responsibility of the District of Columbia Court of Appeals (Respondent herein).

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In The

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District of Columbia Court of Appeals,

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Harry Toussaint Alexander, Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the District of Columbia Court of Appeals, entered in the above entitled

case on September 7, 1983, petition for rehearing en banc denied on December 14, 1983.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals is reported at 466 A.2d 447 (D.C. App., 1983) and is printed in the Appendix hereto at 1a-12a.[1/] The order of the District of Columbia Court of Appeals denying the petition of Respondent below for rehearing en banc is printed in the Appendix hereto at 13a-14a. The Report and Recommendation of the Board on Professional Responsibility of the

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1/ "__a" references are to the pages of the separately bound Appendix which accompanies this Petition.

District of Columbia Court of Appeals is printed in the Appendix hereto at 28a-47a. The Report of Hearing Committee Number Ten of the Board on Professional Responsibility is printed in the Appendix hereto at 15a-27a.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on September 7, 1983. A timely petition for rehearing en banc was denied on December 14, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States; §§ 11-2502 and 11-2503(b) of the D.C. Code (1973), Pub.L. 91-358, 84 Stat 521, § 111, portions of §§ 4, 5 and 7 of Rule XI of the Bar Rules of the District of Columbia Court of Appeals; and portions of Chapters 10 and 12 of the Rules of the Board on Professional Responsibility of the District of Columbia Court of Appeals. All of the relevant provisions are set forth in Section b of the Appendix to this Petition.

STATEMENT OF THE CASE

Section 11-2502 of the District of Columbia Code vests the District of Columbia Court of Appeals with jurisdiction over attorney discipline. To assist it in performing this statutory assignment, the court has established a Board on Professional Responsibility to hear complaints of attorney misconduct, to report its findings and conclusions to the court, and to make appropriate recommendations in connection therewith.[2/] In turn, the Board is authorized to, and does, appoint hearing committees to conduct evidentiary

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2/ Rules Governing the Bar of the District of Columbia, Rule XI, Section 4(l).

hearings. With respect to the matters referred to it, a Hearing Committee will submit a report to the Board setting forth the committee's findings, conclusions, and recommendations.[3/]

Rule 10.4 of the Rules of the Board on Professional Responsibility states, with respect to the conduct of hearings by the Hearing Committee, that "Bar Counsel shall have the burden of proving violations of the disciplinary rules by clear and convincing evidence." Rule 12.6 of the Board's Rules states that "[w]hen reviewing the findings of a Hearing Committee, the Board shall

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3/ Rules Governing the Bar of the District of Columbia, Rule XI, Section 4(3)(c).

employ a 'substantial evidence on the record as a whole' test." So also, as the Court of Appeals stated in its opinion in this case, under its own rules it is "required to 'accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, ...' and must 'adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.' D.C. App. R. XI, Sec. 7(3); In re Smith, 403 A.2d 296, 302-03 (D.C. 1979)." (2a).

In its decision issued on September 7, 1983, a three-judge panel of the Court of Appeals for the District of

Columbia concluded that Petitioner herein, Harry T. Alexander, had "twice neglected a legal matter entrusted to him in violation of DR 6-101(A)(3), and once engaged in conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5)."[4/] (1a-2a). The court ordered that Mr. Alexander "be suspended from the practice of law for a period of three months...." (12a). The Court's decision and order were consistent with the conclusions and recommendation of the Board on Professional

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4/ DR 6-101(A)(3) provides that: "A lawyer shall not ... [n]eglect a legal matter entrusted to him."

DR 1-102(A)(5) provides that: "A lawyer shall not ... [e]ngage in conduct that is prejudicial to the administration of justice."

Responsibility, which, in turn, had agreed with the report of its Hearing Committee. (2a, 30a-31a).

The disciplinary suspension imposed on Mr. Alexander is based on two discrete, relatively brief events. With regard to the first, a trial date had been set for November 6, 1980 in Superior Court before Judge Tim Murphy for a client of Mr. Alexander's who was charged with "driving under the influence" and reckless driving. Although Mr. Alexander did not appear at the prescribed time, the Board accepted Mr. Alexander's explanation that his failure to do so was inadvertent, not willful. Nevertheless, it found his conduct to be prejudicial to the

administration of justice and to constitute neglect of a legal matter entrusted to him, apparently because of what in its view were additional aggravating factors (2a-3a, 7a).

The first of these involved a chance encounter around 3:00 o'clock in the afternoon of November 6th between Mr. Alexander and Judge Murphy's courtroom clerk. The two men passed each other on escalators going in opposite directions as the clerk was hurrying back to the courtroom and Mr. Alexander was hurrying to a court appearance. In the few seconds available for conversation, the clerk advised Mr. Alexander about his failure to appear, indicated that the case would be continued on a

day-to-day basis until the matter was settled, and suggested that Mr. Alexander check with the court. The clerk did not identify the case to Mr. Alexander because he could not recall its name. (60a-67a). Mr. Alexander did appear in Judge Murphy's court on the very next day, November 7, and sought to proffer an explanation for his absence. But by then, the case had been called again and further continued, and Judge Murphy refused to hear the explanation, deciding instead to refer the incident to the Office of Bar Counsel. (7a, 32a-34a).[5/]

5/ Mr. Alexander's written response to the Bar Counsel's complaint stated that, when he and the court clerk met, "I was apparently on my way to another court ..., and at that time it was not convenient to make a

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The second supposedly aggravating factor relied on by the Board was Mr. Alexander's failure to avail himself of the "locator" procedure established for the Superior Court (7a-8a, 32a). That procedure was designed to alleviate situations in which attorneys are aware in advance of a potential scheduling conflict, not for attorneys to check in generally when they are in the courthouse.[6/] Neither the Board nor the

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note, and not having been provided with the name of the case, the incident slipped my mind." (92a). Neither the Board nor the court referred to this explanation, but simply seemed to assume that Mr. Alexander acted in "cavalier" fashion in not contacting Judge Murphy forthwith. (7a, 33a, 35a).

6/ As Judge Murphy explained in his testimony before the Hearing

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Court stated why, if the scheduled appearance in Judge Murphy's court was not noted (albeit inadvertently) on

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Committee, "there was concern caused by actions of mine in disciplining lawyers for failing to appear in court and the lawyers being concerned that they were obligated to be in more courts than one at the same time and it was a Catch 22 situation...." (53a-54a). The court in this case described the "locator" procedure:

> The "locator" procedure permits attorneys to telephone the Chief Judge's Chambers before 8:45 a.m. and give the clerk a list of the attorney's other court appearances scheduled for that day. This list then is distributed to all trial judges in order to facilitate locating an attorney when needed. (7a-8a).

Mr. Alexander's calendar, he should nonetheless have somehow anticipated a scheduling conflict for which he should have used the "locator."[7/]

The other event which resulted in a separate and second finding that Petitioner neglected a legal matter entrusted to him is based on a complaint

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7/ There was no allegation nor any evidence that the interest of Mr. Alexander's client was harmed by Mr. Alexander's failure to appear on November 6. Mr. Alexander had anticipated the case would be disposed of through a negotiated plea, and had previously started negotiations with the prosecutor towards that end. That was indeed the way in which the case ultimately was concluded, to the complete satisfaction of the client (who, notwithstanding Judge Murphy's urging him to file a complaint with Bar Counsel, declined to do so). (56a-59a).

filed by a Larry Fisher and concerns a Superior Court hearing on August 25, 1980 before Judge Fred McIntyre to revoke Mr. Fisher's probation. Mr. Alexander was unable to appear at the August 25 revocation hearing and sent an associate, Patrick Patrissi, instead. (4a, 37a). Mr. Patrissi was a member in good standing of the District of Columbia Bar.

The gist of the Board's finding with regard to the Fisher complaint is that Mr. Patrissi's representation "was completely ineffective", for which Petitioner is responsible; that, as a result, Judge McIntyre made a mistake in sending Mr. Fisher back to jail; and that Petitioner did nothing to correct

the alleged mistake and obtain Mr. Fisher's release. (4a, 9a-10a, 37a-39a, 43a-44a). The record shows without dispute that Mr. Fisher had previously had two preliminary hearings on an unrelated charge for which Mr. Alexander had been retained and at which Mr. Patrissi was present, once as Mr. Fisher's sole counsel to seek a continuance and once accompanying Mr. Alexander (85a-86a). Immediately prior to Mr. Fisher's August 25 revocation hearing, Mr. Patrissi talked briefly with the Assistant U.S. Attorney handling the case and with Mr. Fisher himself (38a).

The transcript of the revocation hearing establishes that the Government

asserted that Mr. Fisher "... never brought proof of employment, ... has not enrolled in a drug treatment program as ordered by this Court ... [a]nd, recently he failed to report on August the 20th and also failed to show for a show cause hearing." (98a). Mr. Patrissi responded in detail to these allegations, explaining that Mr. Fisher did report on one occasion and why he did not report on another occasion. Mr. Patrissi also produced a medical certificate indicating that Mr. Fisher could not be in a drug program because he was hospitalized during the relevant period. In addition, Mr. Patrissi stated that Mr. Fisher was gainfully employed, gave the name of the employer, and offered to bring proof of

Mr. Fisher's employment when challenged by the Government. When the Government then urged that Mr. Fisher "had been arrested several times since he has been placed on probation," Mr. Patrissi twice argued that his probation be continued pending disposition of those cases, pointing out that "[h]e's only been arrested in three, not convicted of any of the three." (100a-103a, 107a-109a).[8/]

8/ Both the Board and the Court fault Mr. Patrissi for not specifically directing Judge McIntyre's attention to Rule 32, Superior Court Rules of Criminal Procedure, which deals with the use of unadjudicated criminal charges in a probation revocation hearing. (4a, 37a-38a). However, neither the Board nor the court mentions that, even if he did not refer to the applicable rule by number, he did assert the basic principle underlying the rule -- not once, but twice.

Notwithstanding Mr. Patrissi's efforts, Judge McIntyre decided to take Mr. Fisher off probation, not permanently, but only until the pending charges on which he had been arrested were "disposed of" (111a-112a). Although Judge McIntyre adverted to the arrests, he expressly stated that he did not feel Mr. Fisher had "been working out on ... [his] probation at all" and emphasized that Mr. Fisher neither "seem[ed] to have any type of employment" nor had presented any evidence of employment to his probation officer (111a).

Mr. Fisher was later released from his incarceration, but not because of any judicial determination that Judge McIntyre had erred. Rather, the record

is unequivocal that the "main basis for release was his [Mr. Fisher's] commitment to cooperate with the government" in then on-going narcotics investigations (77a-78a, 82a, 84a). The attorney for the Public Defender Service who took over Mr. Fisher's representation testified that the situation with respect to the revocation hearing "was very confusing" and that she "was not completely sure that it was proper and within the guidelines." (78a, 79a-80a).[9/]

9/ The Public Defender attorney testified that she "initially... thought that he [Mr. Fisher] was being held pending final revocation, as would be the usual practice of a pending case... that he was probably being held pursuant to... a preliminary determination awaiting the final revocation, which usually would happen after the disposition of the pending case." (73a-74a). The transcript of the August 25 hearing

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The record is also unequivocally clear that Mr. Fisher met with Mr. Alexander about a week after the August 25 revocation hearing. Thus, the transcript of proceedings before Superior Court Judge George H. Revercomb on September 3, 1980 establishes that Mr. Fisher appeared before Judge Revercomb on that date for arraignment on the unrelated charge as to which he had retained Mr. Alexander to represent him, that Mr. Alexander was then present as Mr. Fisher's counsel, that he did

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(111a-112a), referred to above, indicates this is precisely what happened. What seems to have confused the Public Defender was an improper entry, probably due to a clerical error, in Mr. Fisher's jacket.

represent him, and that at the conclusion of the hearing he specifically asked for and was granted permission to confer with Mr. Fisher "in the corner" to discuss "some very important information" (26a-27a, 114a-121a).10/

As to both the complaint by Judge Murphy and the complaint by Mr. Fisher, the Court of Appeals stated with respect to the Board's findings against

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10/ Mr. Fisher untruthfully testified that Mr. Alexander did not appear at his arraignment and he never heard from him after the August 25 revocation hearing. (68a-69a, 70a). Mr. Fisher also untruthfully testified "that Patrissi had not opened his mouth" before Judge McIntyre in the probation revocation hearing. (38a). Mr. Fisher further insisted that he paid Mr. Alexander his full $2000 fee, yet could produce receipts for payments of only $1500 (37a).

Mr. Alexander that "we cannot say that these findings are unsupported by substantial evidence" (10a). At all stages of the proceedings below, Petitioner herein challenged the evidentiary basis for these findings. (e.g. 6a, 48a, 50a-52a). Moreover, Petitioner specifically contended in his brief to the Court of Appeals that the findings of the Board are not supported by clear and convincing evidence. (48a).

REASONS FOR GRANTING THE WRIT

A. Due Process Requires That Disciplinary Orders Against Attorneys Must Be Based On A Higher Standard of Proof Than Substantial Evidence

In In re Ruffalo, 390 U.S. 544, 551 (1968), this Court held that disciplinary proceedings against attorneys "are adversary proceedings of a quasi--criminal nature ..." Because such proceedings may result in "a punishment or penalty imposed on the lawyer... [h]e is accordingly entitled to procedural due process..." Ruffalo, supra, 390 U.S. at 550. Thus, the privilege of practicing law is not "a matter of grace and favor", but rather a right that cannot lightly or capriciously be taken from an attorney; the power to withdraw that

right "ought always to be exercised with great caution". Charlton v. F.T.C., 543 F.2d 903, 906 (D.C. Cir. 1976), citing Wilner v. Committee on Character and Fitness, 373 U.S. 96, 102 (1963); Ex Parte Wall, 107 U.S. 265, 288 (1883); and Ex Parte Garland, 72 U.S. (4 Wall) 333, 379 (1867).

In Addington v. Texas, 441 U.S. 418, 423 (1979), this Court, citing its earlier decision in In re Winship, 397 U.S. 358 (1970), reiterated that "a standard of proof... is embodied in the Due Process Clause", and that the function of such a standard is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual

conclusions for a particular type of adjudication." Specifically, "[t]he standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Ibid.

The Court in Addington described "three standards or levels of proof for different types of cases." Ibid. Thus:

(1) "At one end of the spectrum is the typical civil case involving a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." 393 U.S. at 423.

(2) "In a criminal case, on the other hand, the

interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment... This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt...." 393 U.S. at 393-394.

(3) "The intermediate standard... usually employs some combination of the words 'clear,' 'cogent,' 'unequivocal,' and 'convincing,'.... One typical use of the standard is in civil cases involving allegations of fraud or some other quasi--criminal wrongdoing by the defendant. The interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk

> to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof. Similarly, this Court has used the 'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in civil cases... (deportation)... (denaturalizaton)..." 441 U.S. at 424-425.

In Santosky v. Kramer, 455 U.S. 745, 754-757 (1982), the Court quoted extensively and with approval from Addington, pointing out that the analysis in Addington flowed from a "straightforward consideration" of three distinct factors specified in Mathews v. Eldridge, 424 U.S. 319, 335 (1976): "the private interests affected by the proceeding; the risk of error created by

the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure."

Applying this Court's decisions in Ruffalo, Eldridge, Addington and Santosky to attorney discipline proceedings, we submit that a substantial evidence standard does not pass Constitutional muster. That standard, as this Court has defined it, requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-620 (1966); Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938). "This is something less than

the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. F.M.C., supra. As the United States Court of Appeals for the District of Columbia Circuit stated in Charlton v. F.T.C., supra, in refusing to permit the Federal Trade Commission to suspend an attorney from practicing before it based only on substantial evidence of wrongdoing: "Nowhere in our jurisprudence have we discerned acceptance of a standard of proof tolerating 'something less than the weight of the evidence.'" (543 F.2d at 907).

Indeed, even a preponderance of the evidence standard is Constitutionally questionable in attorney discipline cases. Given that such discipline imposes a punishment or penalty on the lawyer (Ruffalo, supra), and given also that withdrawal of the right to practice law ought always to be exercised with great caution (Ex Parte Wall, supra), surely society has more than a "minimal concern" with the outcome of such proceedings, and surely a "roughly equal" sharing of the risk of error is grossly inequitable. (Addington, supra). Accordingly, nothing less than the "clear, unequivocal and convincing" standard can fairly be said to provide due process. As Addington states, that is the appropriate standard where, as

here, the proceedings are quasi-criminal in nature, and a particularly important individual interest is at stake which is far more substantial than mere loss of money. Both the Appellate Judges Conference and the American Bar Association have recognized this by adopting a "clear and convincing" standard of proof in attorney discipline proceedings.11/

In the instant case, the District of Columbia Court of Appeals did not use a "clear and convincing" standard nor

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11/ Standard 8.40, Joint Committee of Professional Discipline of the Appellate Judges Conference and the Standing Committee on Professional Discipline of the American Bar Association, Standards for Lawyer Disciplinary and Disability Procedures (February, 1979).

even a preponderance of the evidence test in ordering Petitioner's suspension from the practice of law. It was satisfied to take the action it did against Petitioner based only on substantial evidence.

It is no answer to the Constitutional objection that the Board on Professional Responsibility concluded that the Hearing Committee's "findings of fact were supported by clear and convincing evidence." (30a). Matters of attorney discipline are the ultimate responsibility of the District of Columbia Court of Appeals, not the Board. In re Dwyer, 399 A.2d 1, 11-12, (D.C. App., 1979), citing §§ 11-2502 and 11-2503(b), D.C. Code, 1973; cf. Powell

v. Nigro, 543 F.Supp. 1044, 1046 (D.C. 1982). That responsibility cannot be abrogated by the court by delegating it to a non-judicial board, and then treating that board's decisions as those of an independent administrative agency. See Standard 8.49, Joint Committee of Appellate Judge and ABA, supra, n. 11. (The report of a disciplinary committee is advisory only.) The inescapable fact is that, whatever standard of proof the Board used, the statutory decision--maker -- the Court of Appeals -- had only to be persuaded by substantial evidence that discipline was warranted to impose such discipline upon Petitioner. In short, for all that appears in its opinion, the court to whom the statute entrusted the authority to discipline

attorneys could have based its action against the Petitioner on "something less than the weight of the evidence" or on the bare possibility that the inference of Petitioner's wrongdoing was co-existent with a contrary inference. We submit that this is Constitutionally impermissible.[12/]

12/ The District of Columbia Court of Appeals has not been unanimous in delegating its authority to the Board and merely exercising a reviewing function. A strong dissent was filed in In re Colson, 412 A.2d 1160, 1175 (D.C. App., 1979) asserting that "the basic decisional responsibility for the sanction to be imposed in a disciplinary proceeding should rest upon the judges of a jurisdicton's highest court, rather than upon the members of a court-created disciplinary body. After all, our Board on Professional Responsibility is not akin to an administrative agency...."

We further submit that the issue of what standard of proof in attorney discipline proceedings complies with Constitutional due process is an important one meriting this Court's attention. Indeed, the issue goes beyond attorneys, and affects all whose profession or other occupation depends on a license by the government.

B. The Evidentiary Basis For Petitioner's Suspension Is So Inadequate That the Suspension Violates Due Process

Government action adverse to an individual as a result of a criminal or quasi-criminal proceeding violates due process if it is not based on adequate proof. For example, in Thompson v. City of Louisville, 362 U.S. 199 (1960), the

petitioner had been convicted in police court of disorderly conduct and loitering, and this court reviewed "[t]he ultimate question presented to us... whether the charges against petitioner were so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment" (362 U.S. at 199). The Court set aside the convictions, holding that the record was devoid of supporting evidence. In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), the question presented was "whether petitioner, Rudolph Schware, has been denied a license to practice law in New Mexico in violation of the Due Process Clause of the Fourteenth Amendment to the United

States Constitution" (353 U.S. at 233). The Court held that Schware was deprived of due process. In reaching this result, the Court considered in some detail not only the evidence showing Schware was of good moral character, but also the "facts in the record which raised substantial doubts about his moral fitness to practice law" (353 U.S. at 240). The Court concluded that "[i]n the light of petitioner's forceful showing of good moral character, the evidence upon which the State relies... cannot be said to raise substantial doubts about his present good moral character" (353 U.S. at 247).

This is not to say, of course, that the Thompson and Schware cases are

factually analogous to the instant case; obviously, they are not. The point is, though, that this Court has interceded in the past on due process grounds where the evidence is woefully lacking to sustain the result reached by lower courts. We submit we have such a situation in the instant case.

Thus, with respect to Mr. Alexander's inadvertent failure to appear at a hearing in Superior Court before Judge Murphy, the supposed "aggravating" factors relied on by the court below turn out to be no more than "makeweights". The circumstances of Mr. Alexander's disjointed and fragmentary conversation with a court clerk cannot justify characterizing Mr. Alexander as "cavalier"

in his disregard for the court, as if a chance encounter on an escalator were somehow to be equated to formal notification and a command to appear. Moreover, there is no logic whatever to faulting Mr. Alexander for not using the "locator" procedure, which is designed to resolve problems resulting from conflicting scheduling of court dates, when Mr. Alexander did not realize he had a conflict in the first place.

With respect to Mr. Patrissi's supposedly inadequate representation of Mr. Fisher at the latter's revocation of probation hearing (for which Mr. Alexander was deemed responsible), plainly the court's perception of the matter was that Mr. Fisher was deprived of his

liberty for some months because of a mistake by his counsel, who then had no further contact with him. As we have shown (supra, pp. 15-22), the record is clear that the facts are otherwise: no mistake was proven, and there was no abandonment because Mr. Alexander and Mr. Fisher conferred together several days after the hearing. Moreover, it has not been suggested that there was any additional evidence that Mr. Patrissi should have brought to the court's attention at the probation hearing. And, having specifically argued to the court that Mr. Fisher had only been arrested but not convicted on new charges, surely Mr. Patrissi was entitled to assume that an experienced judge would be aware of what limitations the

rules placed on the use of such arrests in making the court's determination of whether to return Mr. Fisher to jail. Indeed, to blame Mr. Patrissi for ignorance of the rules is to implausibly blame both the judge and the Assistant U.S. Attorney handling the case as well for similar lack of knowledge.

The subject of the disciplinary action in this case is a well-known and respected member of the Bar of the District of Columbia as well as of the community in general, having sat as an Associate Judge on the Superior Court of the District of Columbia from 1966 to 1976.[13/] Just as the Schware Court

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13/ Mr. Alexander, who is black, was born in 1924 in New Orleans, Louisiana in other than wealthy

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found inadequate evidence to support the findings below, Petitioner asks this Court to recognize the same type of due process defect here.

CONCLUSION

For all of the reasons set forth

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circumstances. He served in the Navy in World War II, graduated from Xavier University of New Orleans in 1949, and received his J.D. in 1952 from Georgetown University Law School, where he was a member of the Georgetown Law Journal. Prior to his judicial service, Mr. Alexander held various positions in the Department of Justice and also served as an Assistant United States Attorney in Washington, D.C. From 1965 to 1966, he was the principal assistant in that office, second only to the United States Attorney. Since retiring from the bench in 1976, Mr. Alexander has been engaged in a general private practice.

herein, Petitioner asks that this Court grant this Petition and issue a Writ of Certiorari to the District of Columbia Court of Appeals.

Respectfully submitted,

Jewel Lafontant*
Eugene B. Granof
Lester R. Gutman
Vedder, Price, Kaufman,
Kammholz & Day
1919 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 828-5040

Dated: February 4, 1984

* Counsel of Record

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APPENDIX

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EUGENE B. GRANOF
LESTER R. GUTMAN
Vedder, Price, Kaufman,
Kammholz & Day
1919 Pennsylvania Avenue, N.W.
Suite 500
Washington, D.C. 20006
(202) 828-5040

*Counsel of Record

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DISTRICT OF COLUMBIA COURT OF APPEALS

No. M-120-82

IN THE MATTER OF: HARRY TOUSSAINT ALEXANDER,
A Member of the Bar of the
District of Columbia Court of Appeals.

On Report and Recommendation
of the Board on Professional Responsibility

(Argued November 18, 1982 Decided September 7, 1983)

Wallace E. Shipp, Jr., Assistant Bar Counsel, with whom *Fred Grabowsky*, Bar Counsel, was on the brief, for the Board on Professional Responsibility.

James W. Cobb for respondent.

Before KERN and FERREN, *Associate Judges*, and KELLY, *Associate Judge, Retired*.[1]

KELLY, *Associate Judge, Retired*: In this disciplinary proceeding, the Board on Professional Responsibility (Board) concluded, consistent with the report of a Hearing Committee, that respondent, a member of the District of Columbia Bar, twice neglected a legal matter entrusted to him in violation of DR 6-101 (A) (3), and once engaged in conduct prejudicial to the administration of justice in violation of DR 1-102 (A) (5). It recommended

[1] Judge Kelly was an Associate Judge of the court at the time of argument. Her status changed to Associate Judge, Retired, on March 31, 1983.

that respondent be suspended from the practice of law for three months. Respondent argues, in excepting to the Board's report, that (1) the Board erred in rejecting his claim that he was denied a fair and impartial hearing before the Committee; and (2) the findings of the Board, and the sanctions recommended by it, are inconsistent with the weight of the evidence.

Considering the Board's report in light of respondent's exceptions, we are required to "accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, . . ." and must "adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted." D.C. App. R. XI, Sec. 7 (3); *In re Smith*, 403 A.2d 296, 302-03 (D.C. 1979). After careful scrutiny of the Committee hearing transcript, as well as the remainder of the record before us, we conclude that the Board's findings are supported by substantial evidence and that the recommended sanction of three months suspension is comparable to the disposition of cases involving similar misconduct. Accordingly, we affirm.

I

The asserted instances of respondent's misconduct arise from his representation of two different clients. We separately set forth with regard to each the pertinent, uncontested facts found by the Board.

Willie Alexander

Respondent was retained counsel for Willie Alexander who faced charges of driving under the influence and reckless driving. At respondent's request, a trial date of November 6, 1980, was set. On that date, before Judge

Tim Murphy, the case was called. Present were the prosecutor, the government witnesses and the defendant; respondent never appeared. After approximately an hour delay, the case was continued to the following day.

During the afternoon of November 6, respondent was passed in the courthouse by Judge Murphy's clerk who advised him that a case in which he was involved had been continued to the following day due to his failure to appear. The clerk was unable to remember the name of the case. Respondent did not check in with the court.

The next day, November 7, the case again was called; all parties previously present again were present; respondent never appeared. The court continued the case. Later that afternoon, respondent finally appeared before the court. His explanations for his absence were refused, a complaint regarding his conduct having already been directed by the court to the Office of Bar Counsel.[2]

Larry Fisher

In June 1980, respondent was retained by Larry Fisher to represent him at a probation revocation hearing. Respondent requested, and received, a one thousand dollar ($1,000) retainer. Thereafter, Fisher was indicted on an uttering charge. He again sought the representation of respondent who requested an additional one thousand dollar ($1,000) retainer. As arraignment on the uttering

[2] Respondent appears to argue that the trial court acted improperly in directing a complaint of his misconduct to Bar Counsel rather than holding him in contempt. We disagree. Super. Ct. Crim. R. 42 authorizes summary punishment for criminal contempt in permissive terms: "A criminal contempt *may* be punished summarily . . . ." (Emphasis supplied.) In dealing with respondent's conceded contumacy, the court was not limited to summarily holding him in contempt. *See also* D.C. App. R. XI, Sec. 7 (1).

charge was to occur before the probation revocation hearing, Fisher agreed to "transfer" the retainer from the probation revocation case to the uttering case, until further payments could be made. Ultimately, Fisher paid at least five hundred dollars of the second retainer.

At the probation revocation hearing on August 25, 1980, respondent did not appear, sending in his place an associate with his firm, Patrick Patrissi. Patrissi, a member of the District of Columbia Bar, never before had handled a probation revocation; never before had spoken to respondent about the case; and, in fact, by memo from respondent's secretary, was requested to substitute for respondent only that morning. Due to his admitted ignorance of Super. Ct. Crim. R. 32, which grants a defendant the right to postpone a revocation proceeding pending resolution of new criminal charges if those charges are used in pressing the probation violation, Patrissi raised no objection when, based upon Fisher's rearrest, the court revoked probation and sent Fisher to jail.

While in jail, Fisher and his family attempted to contact respondent to request help. Respondent never returned the telephone messages left at his office. On one occasion, respondent's secretary informed Fisher when he called that, unless he fulfilled the retainer agreement, respondent would withdraw as his counsel. Some time later, respondent did withdraw from representing Fisher in the uttering case. Only after Fisher received new appointed counsel on this latter case was the erroneous revocation of his probation recognized and remedied by his release—more than six months later.

II

Respondent challenges the Board's rejection of his claim that he was denied a fair and impartial hearing before

the Committee. After submission of the Hearing Committee's final report, respondent objected in his brief to the Board that a member of the Committee, Willie Leftwich, harbored a personal prejudice against him. According to respondent, this bias arose from the fact that he had replaced Leftwich as litigation counsel on a case from which the latter had been discharged. To support his claim, respondent proffered affidavits of the clients involved attesting to the discharge of Leftwich and pointed to a pattern of allegedly inordinate questioning during the Committee hearing by member Leftwich and chairman Webb. The Board, in its report, found respondent's allegations to be unwarranted. We agree.

To demonstrate a legally sufficient claim of personal prejudice, respondent was required to show facts: (1) which are material and are stated with particularity; (2) which, if true, would convince a reasonable person that bias exists; and (3) which show that the bias is personal, as opposed to judicial, in nature. *In re Evans*, 411 A.2d 984, 994 (D.C. 1980).[3] Nevertheless, other than the bald assertion that he replaced Leftwich after discharge of the latter by the clients, respondent demonstrates no material facts from which an inference of prejudice may be drawn. Indeed, even the fundamental fact that Leftwich was cognizant that respondent was his replacement is assumed; and respondent presents no convincing explanation for why this fact would be true. Further, accepting respondent's assumption that Leftwich knew who succeeded him as counsel, such knowledge, with-

[3] Since, in his role as a Hearing Committee member, Leftwich acted in an adjudicative or quasi-judicial capacity, the standard of disqualification for judicial officers applies. *See Vann v. District of Columbia Board of Funeral Directors and Embalmers*, 441 A.2d 246 (D.C. 1982).

out more, does not establish the existence of a personal bias against respondent.

At the start of the Committee hearing, moreover, respondent was asked whether he had any challenges to the members of the Committee; his reply was, "None at all, Sir." In pressing his assertion of personal prejudice, respondent attempts to avoid the clarity of his response, claiming that at the time of the hearing he was unaware of Leftwich's purported conflict of interest. Nevertheless, similar to his inability to explain how, if at all, Leftwich knew that, after his discharge, respondent had replaced him as counsel, respondent fails to explain convincingly why, as successor counsel, he would not know that Leftwich was his predecessor.[4]

Given the unsubstantiality of respondent's proof of prejudice, the Board was correct in finding his claim to be unwarranted.

III

Respondent's second, and principal contention, is that the Board's findings, and the sanction it recommended, are unsupported by the weight of the evidence.

With regard to his representation of Willie Alexander, the Board concluded that respondent's failure to appear

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[4] Respondent's assertion of the allegedly inordinate questioning of the Committee members as evidence of the bias against him is equally unfounded. Board Rule 8 (c) (1) expressly permits the questioning of a witness by Committee members "for the purpose of clarifying matters brought up at the hearing." The record of the hearing does not evidence an abuse of this permission by the Committee members. In addition, the participation of only two members of the Committee in the filing of the report does not invalidate the Committee report. Two members constitute a quorum and the concurrence of both members made the report the action of a majority thereof. *See* D.C. App. R. XI, Sec. 5 (1).

for trial on November 6-7 constituted a neglect of a legal duty entrusted to him, in violation of DR 6-101 (A) (3), and conduct prejudicial to the administration of justice, in violation of DR 1-102 (A) (5). Although the Board expressed its inclination "to be charitable of Respondent's assertion that he simply forgot that the trial of the case was scheduled for November 6," it found that this asserted lapse of memory was aggravated by several additional factors.

Foremost among these aggravating factors was respondent's apparently "cavalier" disregard of advice from Judge Murphy's clerk that one of his cases had been continued due to his absence. Respondent admitted receiving this information. Nevertheless, he did not check in with the court until the following day.[5] As a result, court proceedings twice were delayed and his client's trial twice was continued. This caused a loss of valuable time to the court, its personnel, and to every other participant in the trial—including respondent's client and the government's witnesses.

While respondent asserted that he spent November 6 in the courthouse, occupied with matters before other judges, he did not avail himself of the "locator" procedure established by the Chief Judge.[6] This procedure was estab-

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[5] Respondent's assertion that this notice was inadequate because the clerk did not state the name of the case is groundless. The gist of the message was that some case involving respondent had been continued for trial due to his failure to appear. At the very least, this information should have prompted respondent to verify its substance. Ignoring it as respondent did, however, merely exacerbated the delay of an already crowded traffic court calendar.

[6] The "locator" procedure permits attorneys to telephone the Chief Judge's Chambers before 8:45 a.m. and give the clerk a

lished to facilitate compromise between the often conflicting schedules of court and counsel. By not taking advantage of this procedure on the morning of November 6, respondent created, and then succumbed, to the exact scenario which the procedure was designed to prevent. For these reasons, the Board concluded that respondent's conduct on November 6 and 7 evidenced "not only gross neglect but also an unenviable lack of appreciation of, and respect for, the judicial process and the Court itself." [7]

As to respondent's representation of Larry Fisher at the August 25, 1980 probation revocation hearing, the Board concluded that he further violated DR 6-101 (A) (3). Assuming, without deciding, the permissibility of respondent sending his associate, Patrick Patrissi, to represent Fisher at the hearing, without Fisher's express

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list of the attorney's other court appearances scheduled for that day. This list then is distributed to all trial judges in order to facilitate locating an attorney when needed.

[7] In addition, respondent admitted that his court calendar reflected no entry for the November 6 trial date before Judge Murphy. Although the Board noted that, "It is essential to the orderly administration of justice in the Superior Court that attorneys give scrupulous attention to cases calendared for trial," it did not address the question whether respondent's failure to update his court calendar violates Super. Ct. Civ. R. 104 (c) (1). That rule states: "Attorneys are expected to carry with them at all times they are in court a calendar of their future court appearances." *id.*; *see* Super. Ct. Crim. R. 57 (a), and expressly places the "professional responsibility" to avoid the setting of conflicting court engagements upon counsel, not the court. *Id.* To carry a court calendar, yet fail to note in it future court appearances when they arise, violates the spirit, if not the letter, of this rule.

prior consent,[8] the Board still found that respondent grossly neglected his client's interests.

This conclusion was based upon the Board's finding that, before the hearing, respondent did nothing to prepare Patrissi for substitution. He discussed with Patrissi neither this case specifically nor probation revocation hearings in general. Patrissi's inexperience in such matters apparently little concerned him. In addition, by notifying Patrissi of his need to substitute on the morning of the hearing, respondent permitted him little, if any, time to prepare on his own.

Rejecting respondent's several "dissembling excuses," the Board found that his neglect in not appearing at the hearing was compounded by his further neglect of Fisher's interest after the erroneous revocation of probation. By office memorandum that same day, Patrissi reported to respondent that Fisher's probation had been revoked.

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[8] At the Committee hearing, Fisher stated that he specifically had retained respondent to represent him. He reasoned, "I was trying to stay out of jail. The man was an ex-judge. I felt like him being an ex-judge, he had a pretty good chance of keeping me out of jail." In light of this statement, the Board noted authority from other jurisdictions for the proposition "that a retained attorney is not authorized to hire another attorney or to delegate his authority to another without the consent of his client". *People v. Betillo*, 53 Misc. 2d 540, ——, 279 N.Y.S. 2d 444, 453 (1967) (citing cases); *see also Koehler v. Wales*, 16 Wash. App. 304, ——, 556 P.2d 233, 236 (1976). Nevertheless, since the Board did not rely upon this proposition in concluding that respondent neglected his client's interests, we need not address its application to the instant case.

Respondent asserts that, at the hearing, Fisher did not object to substitute counsel. Under the circumstances, we do not view this silence as constituting an express consent to the substitution. Nevertheless, whether Fisher consented to the substitution, in light of the Board's analysis, becomes irrelevant.

Nonetheless, respondent took no action to rectify this error during the entire six-month period of Fisher's detention. Respondent did not even bother to return the numerous phone messages left at his office by Fisher and his family.[9] From this history of "callous disregard" for, and wilful neglect of, Fisher's interests, and of a failure even to concern himself with his client's resulting incarceration, the Board concluded that respondent flagrantly violated DR 6-101 (A) (3) by neglecting a matter entrusted to him.

Given the record before us, we cannot say that these findings are unsupported by substantial evidence. *See* D.C. App. R. XI, Sec. 7 (3); *In re Smith, supra*, 403 A.2d at 302-03.

In determining what sanction to impose, the Board noted that respondent did not possess an unblemished disciplinary record. Three times during the previous two and one half years Bar Counsel informally had admonished him for neglecting a client's affairs.[10] The facts in

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[9] With regard to respondent's assertions as to the incredibility of his client, we note that the evaluation of the credibility of a witness is for the fact-finding tribunal. The Hearing Committee heard this witness' testimony and submitted a report containing its findings of fact which were adopted by the Board. We are bound by these findings unless they are not supported by substantial evidence of record. *See* D.C. App. R. XI, Sec. 7 (3).

[10] In Docket No. 327-79, repondent was admonished for neglecting to file a timely motion to stay his client's eviction pending appeal from an eviction order of the lower court in violation of DR 6-101 (A) (3). In Docket No. 423-79, respondent was admonished for neglecting to notify his client of the denial of a motion to vacate sentence and for his failure to timely note an appeal of the denial in violation of DR 6-101 (A) (1) and (3). And again, in Docket No. 378-79, he was admonished for neglect in connection with the representation of the widow

the two cases before it, the Board found, further evidenced a "pattern of repeated neglect, a disregard for the orderly administration of justice, and at times a callous disregard for the interests of his clients." Under the circumstances, including respondent's complete candor and cooperation with the investigation of Bar Counsel, the Board recommended a three-month suspension from the practice of law.

Our review of the Board's recommended sanction is limited. Deciding each case on its own particular facts, *see In re Russell*, 424 A.2d 1087, 1088 (D.C. 1980) (per curiam), we must "respect the Board's sense of equity, . . . [and] enforce a general sense of equality in the sanctions handed out." *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980) (per curiam) (quoting *In re Smith*, *supra*, 403 A.2d at 303). Based upon the findings of the Board, which we affirm above, we cannot say that a three-month suspension is inconsistent with dispositions for comparable conduct or is otherwise unwarranted.[11] D.C. App. R. XI,

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and two children of a man allegedly beaten to death by two deputy marshals. Bar Counsel found that respondent's delay for more than two years barred his client's claim against certain defendants and violated DR 6-101 (A) (2) and (3).

[11] See *In re Knox*, 441 A.2d 265 (D.C. 1982), where, in view of the respondent's prior informal discipline for neglect, we concluded that a three-month suspension was the proper sanction for the current neglect of a personal injury and worker's compensation claim. "[W]hen we have imposed [longer] suspensions for attorneys found to have neglected a client's legal matters, the conduct complained of has been particularly aggravated or has been compounded by other violations." *Id.* at 268. *See, e.g., In re Haupt*, *supra* (respondent suspended for three years for neglect of a legal matter, deceit, misrepresentations to client, and intentional failure to seek client's objection); *In re Smith*, *supra* (respondent suspended for eighteen months for neglecting two civil matters and for misrepre-

Sec. 7 (3); *In re Smith, supra*, 403 A.2d at 303. Accordingly, it is

ORDERED that respondent be suspended from the practice of law for a period of three months, effective thirty days from the date of this decision.

So ordered.

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sentation to client concerning a case); *In re Fogel*, 422 A.2d 966 (D.C. 1980) (per curiam) (respondent suspended for a year and a day for neglecting a client's appeal and making misrepresentations to both the client and the court concerning the same); *in re Russell, supra* (respondent suspended for six months for serious neglect of client's cause, coupled with failure to cooperate with Bar Counsel). Here, as respondent asserts, his conduct encompassed neither criminal activity nor dishonesty nor misrepresentation. And, while he is charged with three violations of the disciplinary rules (two instances of neglect and one instance of conduct prejudicial to the administration of justice), he has cooperated completely and candidly with the Bar Counsel's investigation.

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D. C. 20001
(202) 638-7113

No. M-120-82

FILED DEC 14, 1983

Alan I. Herman
Clerk

In the Matter of

Harry Toussaint Alexander
A Member of the Bar
of the District of Columbia
Court of Appeals

BEFORE: *Newman, Chief Judge; Kern, Nebeker, *Mack, Ferren, Pryor, Belson, Terry, and Rogers, Associate Judges.

O R D E R

On consideration of respondent's petition for rehearing en banc and the response of petitioner and it appearing that no judge of this court has called for a vote thereon, it is

ORDERED that respondent's aforesaid petition is denied. It is

FURTHER ORDERED that the stay entered with respect to the suspension of respondent is terminated, effective December 20, 1983.

PER CURIAM

*Chief Judge Newman and Associate Judge Mack have recused themselves from participating in this case.

Copies to:

James B. Cobb, Esquire
1004 6th Street, N. W.
Washington, D. C. 20001

Thomas H. Henderson, Jr., Esquire
Bar Counsel
Board on Professional Responsibility

Allan R. Snyder, Esquire
Chairman
Board on Professional Responsibility

A true copy,

Test:

ALAN I. HERMAN

Clerk of the District of
Columbia Court of Appeals

By:_____
DEPUTY CLERK

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS
BEFORE AN AD HOC HEARING COMMITTEE

In the Matter of:	:	Bar Docket Nos.
HARRY TOUSSAINT ALEXANDER	:	179-80 189-80
Bar Number 924381	:	

FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS

I. Background

The hearing in this matter was held on July 7, 1981, before an ad hoc Hearing Committee comprised of Edward B. Webb, Esquire Chairman; Willie L. Leftwich, Esquire and Dr. Beryl A. Radin. Wallace E. Shipp, Jr. Assistant Bar Counsel, presented four witnesses, Judge Tim Murphy, Milton P. Brabham, Larry Fisher and Ellen Kreitzberg, Esquire. Respondent appeared pro se, testified and presented Nelda A. Perkins, Willie B. Alexander and Patrick Patrissi, Equire.

Bar Counsel offered Exhibits 1 through 4 and

201 through 206 (Tr. 9 and 14). All Exhibits were admitted.

II. Findings of Fact

/Note: BE is used to identify Bar Counsel's Exhibits, and RE to identify Respondent's Exhibits. TR is used to identify pages of the transcript of the July 7, 1981 hearing. The following findings are essentially those proposed by Bar Counsel./

1. Respondent is an attorney admitted to practice before the D.C. Court of Appeals (See Registration Statement).

2. On June 12, 1971, Respondent was retained to represent Mr. Willie Alexander who had been arrested for Driving Under the Influence and Reckless Driving (BE 4, TR 64).

3. On November 6, 1980, Mr. Alexander's case was set for jury trial, (BE 4, TR 16 and 39). Respondent had notice of the date. (BE 4, 3, TR 33, 34, 80, and 66).

4. On November 6, 1980, Mr. Alexander and the government witnesses appeared and were ready for trial. (BE 1, 4, Tr. 16 and 39)

5. On November 6, 1980, Respondent failed to appear to represent his client and failed to notify the Court or the parties of his whereabouts. (BE 1, 3, 4, TR 16 and 65).

6. On November 6, 1980, Respondent was advised that his client's case had been continued to November 7, 1980, by the Courtroom clerk (Tr. 40-41 and attachment to Respondent's Response to Petition)

7. On November 7, 1980, Mr. Alexander was present and Respondent failed to appear until midafteroon. (BE 1, 3, 4, TR 18-19)

8. On June 9, 1980, Respondent was retained by Mr. Larry Fisher to represent him in probation revocation proceedings in cases 923445-77 and F 373-72. (Tr. 82, 83 and 84)

9. On July 9, 1980, Mr. Fisher retained

Respondent to represent the defendant in an uttering arrest (Case No. F 3358-80) (BE 201, 202, 203, 204, TR 82, 83 and 167)

10. On August 25, 1980, Respondent failed to appear for the show cause hearing and defendant's probation was revoked. Defendant was sentenced without the aid of his attorney. (BE 201, 202, 203, 204, TR 130, 131, 135, 136 and 138)

11. Respondent's associate appeared at the August 25, 1980, probation revocation. Respondent's associate was not adequately prepared to represent Mr. Fisher (Tr. 154, 155, 157 and 158)

12. On September 3, 1980, defendant was arraigned on the uttering charge. Respondent failed to appear for the Court proceeding. (BE 205, TR 131)

III. Discussion

Respondent had a duty to Mr. Alexander and

Mr. Fisher. He failed to discharge that duty, in that he neglected both clients. In addition Respondent owed the Administration for Justice a better effort than he displayed in November 1980.

In the fall of 1980, Respondent chose the date of November 6, 1980, for the trial of his client Mr. Alexander. (Tr. 76) He evidenced that date of his choice by entering it on the status hearing form. (BE 4, TR 76 and 80) On November 6, 1980, Respondent failed to appear. His client was before the court with the D. C. Government announcing that the prosecution was ready. Mr. Alexander waited in Superior Court without knowledge as to Respondent's whereabouts. theclerk met Respondent in the hallway and advised Respondent to appear the next day. Again Respondent failed to write the matter in his calendar or go to the courtroom to check on his client's case. He then failed to appear the next day until advised that the Judge was looking for him.

(BE 2) In midafternoon he appeared. Mr. Alexander had the right to expect his attorney to be present with him when he faced the possibility of a jail sentence. He deserved the same consideration as any of Respondent's other clients to which he states he was attending on that date. Mr. Alexander was left in the dark. The neglect of Mr. Alexander cannot be excused by the statement that it was not on Respondent's calendar, that Mr. Alexander never called him, that the court did not confirm the date, or that it all worked out in the end. (BE 2, TR 67, 71)

It is Respondent's obligation, as a defense attorney, to know in which Courtroom and when he and his clients were due to appear. It is his duty to notify a sitting Judge and interested parties of any problems associated with his inability to appear so as to avoid the waste of Court's time and money.

The language of Disciplinary Rule 1-102(A)(5) does not specify any particular conduct which is prohibited, nor does it define what is "prejudicial to the administration of justice." The framers of the Code of Professional Responsibility, as in most of the other Disciplinary Rules, attempted to set down specific categories of prohibited conduct. It is apparent that, because all occurrences could not be foreseen, the framers included the general proscriptions contained in Disciplinary Rule 1-102. The various subdivisions are addressed to types of misconduct which are not covered specifically elsewhere. Subparagraph (A)(5) is calculated to regulate that conduct of an attorney, not elsewhere prohibited, which is adverse to the general administration of justice.

Conduct which is prohibited by Disciplinary Rule 1-102(A)(5) is conduct which possesses a clear potential for interfering with the order-

ly processes of the Courts. Disregard, by an Officer of the Court, of the time of Judges, the Court Rules, and the perception of the public that justice is being administered improperly are among those activities which are prejudicial to the administration of justice.

Respondent's failure to appear in Court and give adequate notice to the Court, parties, and clients is also an act of neglect. Proper attention to Court Rules, concern for the time of others, and proper administration of his calendar would have avoided the great inconvenience caused. His complete disregard for and neglect of others is clearly unprofessional conduct.

Respondent neglected his client and the matter that was entrusted to him. He prejudiced the orderly operation of the Superior Court. He showed a disregard for the witnesses who gave of their time in furtherance of the

administration of justice.

In a second showing of insensitivity to his clients,Respondent undertook the representation of Mr. Larry Fisher for a fee of $2,000.00 of which $1,000.00 was paid. He sent an associate not experienced in these proceedings to handle the revocation. The associate had never handled a revocation, failed to adequately communicate with Mr. Fisher prior to the hearing, failed to communicate with the U.S. Attorney, or the probation officer and allowed Mr. Fisher's Probation to be revoked without the hearing to which he was entitled. Rules 32(f)(2)(3) and (4) of the Superior Court Rules of Criminal Procedures provide for a second hearing which was not requested for Mr. Fisher. (TR. 154, 155 and 157) Mr. Fisher was entitled to the service of the Counsel he had retained unless he made a knowing waiver. (TR.131) Respondent then, in the final act of disregard, failed to appear

for Mr. Fisher's arraignment on the second case. As a result of Respondent's neglect, Mr. Fisher was sentenced without his second hearing and was forced to ask the court to appoint an attorney to help him solve his plight. Counsel was appointed who successfully extracted Mr. Fisher from the situation caused by Respondent's neglect. (TR. 133-139) Mr. Fisher's incarceration from August 25, 1980 until March 1981 must in part be blamed upon Respondent's representation.

IV. Conclusions and Recommendation for Disciplinary Action

Respondent's failure to accept responsibility for his acts, demonstrates a callous disregard for the administration of justice and his client's welfare. Protection of the public and of the judicial system requires the suspension of Mr. Alexander for three months. The Committee believes this disciplinary action constitutes a proper balancing of the interests involved.

Petition to Reopen

Respondent filed, on August 11, 1981, a Petition to Reopen the record for the purpose of taking the testimony of Judge McIntyre; the introduction of the transcript of the November 7, 1980, proceeding; and for the introduction of a copy of his resume.

Bar Counsel has opposed the petition for procedural and substantive reasons. Respondent has filed an Reply and Bar Counsel has supplemented his Opposition. With respondent's Reply was a copy of the transcript from the arraignment (Fisher) of September 3, 1980, which indicated respondent's presence and other documents immaterial to the substance of that point.

Petitions to Reopen are governed by Chap. 8, 8(7) of the Board Rules. Respondent is obligated to present such facts that will convince the Committee that the interests of justice require

reopening. Matters such as a material change of facts or law occurring since the hearing may be acceptable grounds. In this case, the petition fails to set forth the basis on which this proceeding could be reopened. Respondent, if he wanted to rely on Judge McIntyre's testimony, could have sought such testimony prior to the hearing or raised the absence of a vital witness as grounds for seeking continuance before the hearing. No explanation why these courses were not pursued is made. Accordingly, the petition is denied.

Documents submitted by respondent are in the same category. No explanation is offered as to the unavailability of these documents (except the envelope mailed by respondent containing the transcript) on the date of the hearing. Clearly the transcript of September 3, 1980 would have seemed crucial to respondent's defense since that puts in issue a fact of the specification of charges-see Count II. Docket 189-80 par. 10.

In any event, Bar Counsel has not opposed the receipt of these documents and therefore they are received. We further point out for the Board the apparent inconsistency with our finding in par. 12,hereof.

Finally, we wish to emphasize that respondent's failure to appear on November 6, 1980 (Alexander) and on August 25, 1980 (Fisher) were the actions that the Committee felt determinative. Therefore, the presence or absence of the respondent on September 3, 1980, was not crucial to our decision or recommendation.

Respectfully submitted,
Ad Hoc Hearing Committee

E. Bruce Webb, Jr.

Willie L. Leftwich

BOARD ON PROFESSIONAL RESPONSIBILITY
DISTRICT OF COLUMBIA COURT OF APPEALS

In the matter of	: Bar Docket Numbers
HARRY TOUSSAINT ALEXANDER:	179-80 189-80
Respondent	:

REPORT AND RECOMMENDATION

After Hearing Committee Number Ten had submitted its final report in these cases, the Respondent, a former judge of the Superior Court who attended the hearing pro se, filed with the Board papers launching a sharp personal attack on two of the Committee members, Edward B. Webb, Esquire, and Willie L. Leftwich, Esquire.[1/] Respondent accused Mr. Webb of being "antagonistic and hostile," and said Mr. Webb had "thwarted" Respondent's theory of defense.

1/ There was a third Hearing Committee member, Dr. Beryl A. Radin, who did not sit through the second case heard by the Committee but who, nevertheless, signed the original Committee report. The Board remanded the cases to the Committee, and the two remaining members then signed and filed the final report alone, pursuant to Court Rule XI, Section 5(1).

He asserted Mr. Leftwich was "biased and prejudiced" and had a "conflict of interest which he failed to reveal to Respondent,"[2/] and about which Respondent allegedly later learned. Also, "The Committee," he said, "acted merely as a rubber stamp of Bar Counsel." And, in argument before the Board, counsel for Respondent (appearing for the first time) implied that the Respondent was the victim of prejudice and that three prior admonitions which Bar Counsel had issued against Respondent in cases of alleged neglect resulted from such prejudice.

The Hearing Committee found that the Respondent had violated Disciplinary Rule 6-101 (a)(3) in neglecting legal matters entrusted to

2/ At the outset of the hearing before the Committee Respondent had affirmatively stated that he had no "challenge" to its composition. (Tr. 3) The conflict of interest charge is untenable. Mr. Leftwich had represented certain deputy marshals in a case. They later changed attorneys and retained the Respondent.

him, and Disciplinary Rule 1-102(A)(5) in engaging in conduct prejudicial to the administration of justice. It recommended that the Respondent be suspended from the practice of law for a period of three months. The Board has carefully reviewed the full record in the two cases now before it and in the cases involving prior admonitions by Bar Counsel. We are of the opinion that Respondent's ad hominem attack on the Hearing Committee was completely unwarranted; that Bar Counsel's three informal admonitions against Respondent were proper; that there was no basis in the record for the innuendos of prejudice which counsel for Respondent made in his oral argument to the Board; and that the Committee's findings of fact were supported by clear and convincing evidence. We affirm the Committee's

findings, and we approve its recommendation that Respondent be suspended from the practice of law for a period of three months.[3/]

We turn now to a discussion of the two cases involved in these proceedings.

1. CASE NO. 179-80

Following a complaint by Judge Tim Murphy, of the Superior Court, Bar Counsel filed a petition against Respondent which asserted in substance that Respondent had failed to appear on November 6, 1980 for a scheduled trial of a case before Judge Murphy, that the Court thereupon continued the case until the following morning, that Respondent had been personally advised during the day of Respondent's default in appearance and of the one-day postponement, and that Respondent still failed to show up in Judge Murphy's Court until 2:00 p.m. on the second day.

3/ We refer to Committee findings 1 through 11, inclusive. We deem finding 12 as impliedly abandoned by the Committee when it rejected Respondent's motion to reopen the hearing.

It appears from the testimony that one Willie B. Alexander was before the Court on a charge of driving under the influence of alcohol and that the Respondent was his counsel. The Respondent had arranged to have the case set for trial on November 6, 1980, but failed to make a note of the date. When the case came on for hearing on November 6 in Judge Murphy's Court, the prosecuting attorney, his witnesses, and the defendant were all present. Respondent was not there, but was elsewhere in the Courthouse. Respondent had also failed to take advantage of a procedure established by the Chief Judge pursuant to which attorneys may call the Chief Judge's Chambers prior to 8:45 a.m. and give to the Judge's Clerk a list of other matters which the attorney may have pending in other Courtrooms during the day.

Because of the absence of Respondent, and after waiting for an hour for his appearance,

Judge Murphy continued the case until the following morning.

About 3:00 o'clock on the afternoon of November 6, Mr. Milton Brabham, Judge Murphy's Clerk, passed the Respondent on the escalator. "I informed him," he said, "that he had a matter before the Judge and it would be to his advantage to check in the Court as soon as possible because we had not seen him that day." Mr. Brabham further said that he could not give the Respondent the name of the case because he did not remember it. He did tell Respondent that the case had been continued until the next day.[4/]

When the Respondent did not appear later on November 6, or on the morning of November 7, the date to which the case had been continued, Judge Murphy continued the case again and dictated his Complaint to the Board. Respond-

4/ Tr. 40, 41.

ent finally appeared before the Court in the afternoon of the 7th, and Judge Murphy then declined to discuss the matter with him.

The Board, like the Hearing Committee, is of the opinion that Respondent's conduct in this case clearly constituted neglect of a legal matter entrusted to him in violation of DR 6-101(A)(3), and that it also constituted conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5). 5/

It is essential to the orderly administration of justice in the Superior Court that attorneys give scrupulous attention to cases calendared for trial. This is especially important in view of the large number of sitting judges, jurors, and witnesses concerned. The procedures outlined by the Chief Judge for minimizing conflicts and delays are appropriate and helpful. The Board is inclined to be

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5/ In re White, No. M 52-80, Memorandum Opinion (D.C. App., August 27, 1981)

charitable of Respondent's assertion that he simply forgot that the trial of the case was scheduled for November 6, but this cannot excuse his cavalier actions in ignoring the notice and warning given to him by Milton Brabham in the afternoon of that day to the effect that Respondent should check in as soon as possible with Judge Murphy because a case in which he was involved had been called for trial that day, and had been continued until the following morning.

Respondent's conduct here evidences not only gross neglect but also an unenviable lack of appreciation of, and respect for, the judicial process and the Court itself. Such conduct cannot be condoned.

2. CASE NO. 189-80

In June, 1980, one Larry Fisher, who had been convicted in a felony case, and who had been released on probation, was served with notice that there would be a hearing on a

possible revocation of his probation. He retained the services of Respondent to represent him in the revocation proceedings because, as he said, "I was trying to stay out of jail. The man was an ex-judge. I felt like him being an ex-judge, he had a pretty good chance of keeping me out of jail." 6/ Respondent told Fisher that his fee for this service would be $1,000.00,and Fisher paid it.

Shortly thereafter, Fisher was indicted again on another charge,that of uttering. He again sought the services of Respondent and was told that Respondent would require another $1,000.00 fee. Because the uttering arraignment was set for an earlier time than the probation revocation case, Fisher agreed, at Respondent's request to "transfer" his $1,000.00 retainer from the probation revocation case to the uttering case until he could make additional payments. He did pay at least an additional

6/ Tr. 118.

$500.00 to Respondent before the probation revocation case was heard. 7/

The probation revocation case came on for hearing before Judge McIntyre on August 25, 1980. Respondent was not present but sent in his stead an assistant, one Patrick Patrissi, who had received a memorandum from Respondent's secretary that morning asking him to appear for Fisher in Respondent's place. Patrissi had never talked to Respondent about the case; he had never handled a probation revocation case in his life, he had not interviewed the Assistant District Attorney in charge; and he did not even know of the provisions of the Criminal Rule of the Superior Court which grants to a defendant the right to postpone a revocation proceeding pending resolution of the new criminal charges if those charges have been

7/ Fisher says he paid Respondent the entire additional $1,000.00. This is denied by Respondent. Fisher has receipts for payment of only $1,500.00.

used in pressing the probation violation charges.[8/]

Fisher testified that Patrissi had not opened his mouth before Judge McIntyre in the probation revocation hearing. This was not true.[8a/] Patrissi himself testified that he talked briefly to the U.S. Attorney and to Fisher himself just prior to the hearing. His representation to Judge McIntyre was completely ineffective. The Judge revoked Fisher's probation and sent him to jail.

While in jail, Fisher tried, without success, to reach Respondent by telephone to advise him of his plight and ask him for help.

8/ In cross-examination of Patrissi Assistant Bar Counsel mistakenly referred to this as Rule 34. It is Rule 32.

8a/ After the completion of oral testimony, the Hearing Committee permitted Respondent to offer a transcript of the revocation hearing which showed that Patrissi did make certain representations to the Court.

Miss Perkins, secretary to the Respondent, testified that on one of these occasions, " I told him (Fisher) he had not fulfilled his retainer agreement; that he had to send someone in to fulfill it or else Judge Alexander would not represent him on the matter ... /He would/ withdraw as his counsel." 9/

Meanwhile, Respondent withdrew from representing Fisher in the uttering case,and Judge Revercomb appointed a Ms. Kreitzberg to represent him. In the course of her conversations with Fisher, who was then in jail, she learned of Patrissi's performance before Judge McIntyre and his failure to ask for the postponement in the revocation proceeding to which he was entitled as a matter of right under Criminal Rule 32. Then, after consultation with the District Attorney and Judge McIntyre, she was finally able to get Fisher released from jail in March, 1981. He had been there

9/ Tr. 162.

more than six months as a result of his probation revocation on August 25, 1980.

In Respondent's cross-examination of Fisher, the latter denied that he knew that "sometimes assistants have to appear when the calendar is crowded." [10/] He also asserted (in response to a question by Mr. Leftwich) that it was his understanding that he had retained the services of Respondent. [11/] Respondent, on the stand, did not deny these assertions of Fisher, and this Board accepts the assertions as true.

At one point Fisher was asked by Respondent: "Were you not advised that (on August 25th) Harry Toussaint Alexander was in the Supreme Court of Connecticut?" Fisher answered in the negative. [12/] He said he was advised at the hearing that Mr. Alexander was out of town

10/ Tr. 102.

11/ Tr. 131

12/ Tr. 101

and would not be there. 13/ He said he expected that Mr. Patrissi, who said Alexander was out of town, would ask for a continuance, but he did not. 14/

Elsewhere in the record Respondent admits that he was probably not in Connecticut on the date of the probation revocation hearing, and indicates he may have been in New Orleans because of his father's illness. 15/ He followed this, however, by saying he was not sure he was in New Orleans on August 25, because his calendar contained a number of matters on it which had not been stricken off. 16/ In his brief before the Board, Respondent averred "that on the date Respondent's matter was scheduled before Judge McIntyre, Respondent had three other matters on his calendar." 17/

13/ Tr. 101
14/ Tr. 87, 105
15/ Tr. 172
16/ Tr. 176
17/ Brief for Respondent, p 10.

But elsewhere in his brief, Respondent refers to what may be the real reason for his failure to appear personally before Judge McIntyre as Fisher's attorney on August 25. Respondent claims Mr. Fisher never "fully retained" him on the probation revocation proceedings because on August 25 he had paid only $1,500.00 on his agreed $2,000.00 fee. 18/

The Board rejects all of these dissembling excuses for Respondent's gross neglect of Fisher's case, neglect that was to prove so costly to him. Respondent has not denied that he was employed to give personal representation to Fisher. The record shows that he did in fact enter his appearance for his client and was present on his behalf on two prior occasions before Judge McIntyre when the proceed-

18/ Brief for Respondent, p. 8.

ings were continued. Respondent was Fisher's attorney of record in the case and when it came on for hearing on August 25 he had not withdrawn as counsel. The argument that Fisher had not then "fully retained" Respondent is specious.

There is definite authority for the position "that a retained attorney is not authorized to hire another attorney or to delegate his authority to another without consent of his client."[19/] But even if we assume that under exceptional circumstances Respondent might have been justified in sending an associate to act for him in the probation revocation proceedings without that consent, we still find that Respondent grossly neglected his client's interests. He told Patrissi, the associate, nothing about the case in advance. He did not

19/ People v. Batillo, 279 N.Y.S. 2nd 444, 453 (1967) and cases cited.

talk to Patrissi about the matter at all and only gave him an hour's notice by brief memo that he was to stand in Respondent's shoes and be the guardian of Fisher's liberty at the August 25 hearing.

The Board concludes that Respondent's conduct in this case evinces a callous disregard of his client's interests, a willful neglect of his interests,and a failure even to concern himself with Fisher's six months' incarceration--all because Respondent was still owed $500.00 on his $2,000.00 fee. Respondent's conduct is in flagrant violation of DR 6-101 (A)(3) which proscribes an attorney from neglecting matters entrusted to him.

CONCLUSION

As mentioned at the outset of this report Respondent already has a blemished disciplinar record. On three prior occasions during the past two and a half years Bar Counsel has foun

it necessary to issue informal admonitions against him.

In Docket Number 327-79 Respondent was admonished for neglecting to file a timely motion to stay his client's eviction pending appeal from an eviction order of the lower court in violation of DR 6-101(A)(3). In Docket Number 423-79 Respondent was admonished for neglecting to notify his client of the denial of a motion to vacate sentence and for his failure to timely note an appeal of the denial in violation of DR 6-101(A)(1) and (3). In Docket Number 378-79 he was admonished for neglect in connection with the representation of the widow and two children of a man allegedly beaten to death by two deputy marshals. Bar Counsel found that Respondent's delay for more than two years barred his client's claim against certain defendants and violated DR 6-101 (A)(2) and (3).

Respondent has been guilty of repeated neglect of his clients' affairs. The instances recited in this report show a pattern of repeated neglect, a disregard for the orderly administration of justice, and at times a callous disregard for the interests of his clients. Under the circumstances we are of the opinion that the three months' suspension recommended by the Hearing Committee is fully warranted, and we recommend that it be imposed upon Respondent by the Court. 20/

BOARD ON PROFESSIONAL RESPONSIBILITY

By _____
Edmund D. Campbell

Date: May 19, 1982

20/ See: In re Knox, 441 A. 2d 265 (D.C. App. 1982) (Respondent suspended for three months for neglecting a personal injury and workmen's compensation claim; prior informal discipline for neglect considered); In re Dwyer, Memorandum Opinion and Judgment, No. M-61(80), D.C. App. June 9, 1981, (Respondent suspended for three months for inadequate preparation and neglect of two civil matters, and failure to deposit disputed funds in a separate trust account); In re Schattman, Memorandum Opinion and

Mr. Vinson, Mrs. Pollard and Miss Rosenberg did not participate in these proceedings. All other members of the Board concur in this report.

Footnote 20/ Cont'd.

and Judgment, No. M-63(81), D.C. App., June 2, 1981 (Respondent suspended for three months for neglecting to settle disputed claim with former client and failing to cooperate with Bar Counsel).

Excerpted Portion Of Respondent's (Petitioner Herein) Brief To Court Of Appeals

[p.3] The following exemptions were filed on behalf of Respondent with the District of Columbia Court of Appeals:

1. That the findings of the Board are inconsistent with the weight of the evidence.

2. That the findings of the Board are not supported by clear and convincing evidence.

3. That the report of the Board should be rejected because it is based upon an erroneous interpretation of the case law and other laws dealing with those circumstances for which Respondent has been charged.

4. That the report should be rejected because Respondent was denied a fair and impartial hearing.

5. For such other and further matters as may be presented to the Board upon a formal granting of this review.

On June 18, 1982, the District of Columbia Court of Appeals ordered that Respondent's brief to the Court is due on or before July 27, 1982; Bar Counsel's brief to the Court is due on or before August 25, 1982, and the case be calendared for oral argument as the business of the Court permits.

On July 21, 1982, the District of Columbia Court of Appeals granted the Motion for Enlargement of Time for Submission of Respondent's Brief until August 16, 1982.

Excerpted Portion of Respondent's
(Petitioner Herein) Brief To The Board
On Professional Responsibility

[p. 4 and 5]

ARGUMENT

I. BAR COUNSEL FAILED TO SUSTAIN ITS BURDEN OF PROOF BY CLEAR AND CONVINCING EVIDENCE

A. Introduction

At the outset Respondent wishes to submit to the Board a sincere apology for any inconvenience or adversity to the administration of justice resulting from any act of omission or commission. However, Respondent wishes to contest the method by which the Hearing Committee conducted the proceedings; arrived at the Findings; and the Recommendation.

Disciplinary proceedings are adversary, and adjudicatory proceedings.

Inasmuch as they are concerned with property rights of respondent-bar-members, fundamental due process safeguards must be observed. In re Buffalo, 390 U.S. 544 (1968). In re Colson, 412 A. 2d 1160 (D. C. App. 1968); In re Wild, 361 A. 2d 182 (D.C. App. 1976). Therefore, procedural requirements analogous to those of other "contested cases" must be observed in attorney disciplinary cases. In re Throup, 432 A. 2d 1221 (D. C. App. 1981).

In making its findings of fact, the Board is required to employ a clear and convincing evidence standard. In re Smith 403 A. 2d 296 (D.C. App. 1979). Moreover, the Board's own rules specify that:

> Except as provided in Section 7(1) of Rule XI of the Rules Governing the Board prescribing probable cause hearings, the standard of proof at all hearings is clear and convincing evidence. Bar

> Counsel shall have the burden of proof, except in reinstatement proceedings. Internal Rules of Board of Professional Responsibility, Chapter 8, No. 5 (emphasis added).

In addition, the Courts have generally held that the burden of proof in attorney disciplinary proceedings is on the proponent. Charlton v. Federal Trade Commission, 177 U.S. App. D.C. 4181, 543 F. 2d 903 (1976).

It is Respondent's contention that when viewed against this Standard, Bar Counsel has failed to carry his burden of proof and therefore the charges against Respondent must be dismissed.

Excerpted Portions Of The Hearing Transcript Of Hearing Before Hearing Committee No. 10 In Bar Docket No. 179-80 (Murphy Complaint) And Bar Docket No. 189-80 (Fisher Complaint)

[p.15] JUDGE TIM MURPHY, having been duly sworn by the Chairman, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SHIPP:

. . . .

[p.17-18]

Q. Now, you mentioned Memorandum 50. Could you explain that to the Committee?

A. As a result of a strike about a year ago in which there was concern caused by actions of mine in disciplining lawyers for failing to appear in court and the lawyers being concerned that they were obligated

to be in more courts than one at the same time and it was a Catch 22 situation, the Chief Judge established a procedure where prior to 8:45, attorneys can call the Chief Judge's Chambers, and his staff types the lawyer's name on a list, plus the name of each case that they have and the court-room they are due and the nature of the proceeding, sentencing, trial, status hearing, motion, et cetera.

That is distributed by 9 or 9:15 to every criminal trial Judge so that if a case is called and you are

looking for a lawyer and
they have called in, you
know they are in one of
whatever number of courts,
and your clerk can call
that particular court and
say, where is Mr. and Miss
X, they are needed in such
and such a courtroom; or
if the lawyer says, I have
a trial going, can you handle
my case earlier because
I am due in trial, you can
determine whether they
have indicated that they
in fact have a trial set
in another court.

. . . .

[p.21] CROSS-EXAMINATION BY MR. ALEXANDER:

. . . .

[p.28-30]

Q. Did Your Honor send, prior thereto, Mr. Willie Alexander to the Disciplinary Board?

A. Yes, whether he ever went, I don't know, but I referred him to the Disciplinary Board.

Q. So the entry is that Your Honor referred him to the Disciplinary Board; is that correct?

A. The defendant was sent to the Disciplinary Board refers to Willie Alexander, not to Respondent.

Q. Did Your Honor receive any information that Mr. Willie Alexander complained against his counsel, Harry Toussaint Alexander?

A. No, I have no knowledge one way or the other.

Q. Haven't you learned, Your Honor, that Mr. Willie Alexander has never complained about his counsel?

A. No.

Q. During the time of sentencing, wasn't Mr. Alexander asked among other things whether he was satisfied or dissatisfied with his lawyer?

MR. LEFTWICH: May I ask the relevance?

MR. ALEXANDER: The relevance, sir, is that Mr. Willie Alexander, the record will reflect, had not complained and is not complaining today.

MR. LEFTWICH: Can't we get a stipulation?

CHAIRMAN: Well, what's the relevance of that, even if he hasn't?

MR. ALEXANDER: The relevance is that the client, the, quote, victim, unquote, is not hostile about the matter and is not complaining about the matter even though he was sent to the Disciplinary Board.

CHAIRMAN: I think it's a close question as to whether or not that's relevant, if that, and maybe you had better move on to another area.

MR. ALEXANDER: Very well, sir.

MR. LEFTWICH: Mr. Alexander, if you would like, sir, we would be willing to accept a stipulation.

MR. ALEXANDER: I'm sure Mr. Shipp knows that is correct.

MR. SHIPP: I have never processed any complaint by Mr. Willie Alexander in reference to this matter. I've never talked to him.

MR. LEFTWICH: Can we get a stipulation?

MR. SHIPP: Certainly, that he didn't file any complaint with us.

MR. LEFTWICH: Fine.

MR. ALEXANDER: Thank you, sir.

. . . .

[p.38] MILTON P. BRABHAM, having been duly sworn by the Chairman, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SHIPP:

Q. Sir, how are you employed?

A. I am employed as a courtroom clerk, criminal division, D.C. Superior Court.

. . . .

[p.40-41] Q. Did there come a time when you saw Respondent, Mr. Alexander?

A. Yes, I was coming from the District of Columbia clerk's office. I had to pick up the cases for the following day as I do every day to get a gist of what the next day's calendar looks like and prepare the cases for

that day. I was coming down the escalator. Attorney Alexander was going up the escalator heading towards the fourth floor. I informed him that he had a matter before Judge Murphy. However, I could not remember the name of the case for the simple reason that the defendant and the attorney had the same last names, it just didn't dawn on me that that was the case. At the time we were in trial and I had to hurry back to the courtroom. Being that we were in traffic trial, we do not have a deputy United

States marshal. At that point, that means I assume the duties of the said marshal as courtroom security. We had a somewhat agitated defendant at the time. As a result, at the end of his trial, he did go to jail, so I had to be there.

Q. Now, when you saw Mr. Alexander, what did you tell him?

A. I informed him that he had a matter before the Judge and it would be to his advantage to check in with the court as soon as possible because we had not seen him that day, and I couldn't give him the name of the case. It just didn't click at the time.

Q. Did you inform him about...

A. I also informed him that we sent the defendant home and that we continued it till the next day. Judge Murphy indicated he would continue the case on a day-to-day basis until the matter was settled.

Q. Did he say anything to you?

A. No, I got an affirmative response from Mr. Alexander. He shook his head and indicated that... he asked me the name of the case. Like I say, I didn't know, but I did inform him that it was to be continued for the next day.

Q. Did he thank you for the information?

A. Yes.

CHAIRMAN: What time was this?

A. This was in the afternoon, I would say somewhere between 3 and 3:15, because that's when I usually get my cases.

CHAIRMAN: 3:15?

A. Somewhere in that area; approximately 3 o'clock, 3:15, because the calendar isn't complete until 2:30, 3 o'clock by the traffic clerks. That way, I can pick them up in their completed form.

. . . .

[p.43-45] CROSS-EXAMINATION BY MR. ALEXANDER:

Q. Sir, did you testify that you were in a hurry on the escalator

A. Yes, I had an armful of jackets and I had to get back to the courtroom.

Q. Did you testify that Respondent, Mr. Harry Toussaint Alexander, was in a hurry?

A. I don't know why you were in a hurry. I don't know where you were heading, but you were going in the opposite direction. I was on the escalator.

Q. Which direction were you going?

A. I was going towards the third floor; you were heading towards the fourth, coming from the fourth floor.

Q. I was coming from the fourth floor?

A. No, I was.

Q. You were coming from the fourth floor?

A. Yes.

Q. So if you were coming from the fourth, then Respondent was going towards the fourth?

A. Yes.

Q. And this was an occasion when the escalators were moving?

A. Yes.

Q. Were you about the middle of the escalator?

A. Fairly, yes.

Q. When you passed me, was the Respondent about the middle of the escalator?

A. Yes.

Q. Now, the escalator didn't stop?

A. No.

Q. Didn't break?

A. No.

Q. Would you tell us all of the things you said to the respondent?

CHAIRMAN: Mr. Alexander, we would agree that there was a limited time upon which a conversation had to be conducted between the two of you. We understand the situation to be as you described it. We understand his testimony to be as he described it. Do you have any further questions?

. . . .

[p.80] LARRY FISHER, having been duly sworn by the Chairman, was examined and testified as follows:

DIRECT EXAMINATION BY MR. SHIPP:

. . . .

[p.90] Q. Did there come a time you were indicted on the uttering case?

A. Right, after I was stepped back and sent over to the jail, a day or a couple days later the court called and I didn't understand, I thought I was going back in front of Judge McIntyre, but I found out when I got down to the court that they had brought the uttering charge back up that I had been indicted on. Once I got in the courtroom,

I thought Mr. Alexander was going to be there. It was my impression that he still represented me on that case. When I got in the courtroom, there was a lady there. She told Judge Revercomb that Mr. Alexander said that he was paid no retainer fee for this case; that I had paid him no money; and that he didn't represent me.

Q. Did you ever talk to Mr. Alexander again about these cases?

A. No, I haven't. I've tried numerous times.

. . . .

[p.128] REDIRECT EXAMINATION BY MR. SHIPP:

. . . .

[p.131] Q. Following your incarceration did he contact you; did Mr. Alexander contact you?

A. No, sir, never.

Q. Did he appear with you at your arraignment?

A. No, sir.

Q. Did you ever hear from him again?

A. No, sir.

. . . .

[p.133-135] ELLEN KREITZBERG, having been duly sworn by the Chairman, was examined and testified as follows;

DIRECT EXAMINATION BY MR. SHIPP:

Q. Would you give us your full name?

A. Ellen Kreitzberg, K-r-e-i-t-z-b-e-r-g.

Q. Miss Kreitzberg, how are you employed?

A. I'm an attorney at the Public Defender's Office.

Q. Do you know the complainant in this case, Mr. Fisher?

A. Yes, I do.

Q. How do you know him?

A. I was appointed to represent Mr. Fisher in a case he had at that time that was pending before Judge Revercomb back in October of 1980, and have since then become involved in some of his other proceedings before Judge McIntyre.

Q. You represented him in both the uttering case in court?

A. That's correct. It's a felony case, 3358-80, which was the uttering felony case before Judge Revercomb. That was the case under which I received my initial appointment after becoming involved in the case because the negotiations became interrelated. I also became involved before Judge McIntyre on his probation revocation proceedings, which were, I believe, 1977 and 1978 cases.

. . . .

[p.136-140 Q. When you investigated these probation revocations, he had been, in fact, sentenced

to those at that time; is that correct?

A. That was my understanding. The court jacket, I think, reflected, when I finally was able to locate the court jacket...let me start off by saying, initially I thought that he was being held pending final revocation, as would be the usual practice of a pending case. So I had assumed at first, although Mr. Fisher had told me he was serving his sentence, I figured, based on experience, that he was probably being held pursuant to what would be a Peters One Hearing, or a preliminary determination

awaiting the final revocation, which usually would happen after the disposition of the pending case. So in other words, when someone is arrested, usually a judge may have a hearing and make a decision to have the person held or released under certain conditions, and then the final decision whether to revocate would be when the pending cases either found guilty, not guilty, or settled in a disposition.

Since he had the felony case pending, I assumed that he was in that in-between status. Although when I got the jacket it

appeared that the sentence had been reinstated, that is he was actually serving his sentence of one to four, one to five years.

Q. Have you handled these Peters One, Peters Two hearings before?

A. I have, and that was why I was confused as to what his exact status was. It appeared that his pending felony case...I got in at the point where he had already been indicted, and I believe it was a grand jury original, which was another question I had. Usually if someone is arrested on a felony, there

would be a preliminary hearing. That, to some degree, would satisfy for an initial determination. Here I couldn't find any information concerning a preliminary hearing, so I couldn't even determine whether the judge had made even an initial determination as to probable cause of the new arrest or what the status was. Because of that it was very confusing to me to determine what exactly was going on.

Q. But there had been no Peters One Hearing and no preliminary hearing?

A. That was what I later determined.

Q. Did you take action as a result of finding that out?

A. Most of the action involved negotiations with Mr. O'Malley in the U.S. Attorney's Office. He's involved in the drug enforcement, drug investigation branch there. He was very interested in information that he felt Mr. Fisher had concerning drug trafficking both on the street and in the various institutions, and wished to work with Mr. Fisher in that regard. In order to do that it was just as important for Mr. O'Malley to have Mr. Fisher released from the institution. So

he and I, in a sense, began working together in a joint effort to get Mr. Fisher released.

In that connection is how I became involved in his old felony cases before Judge McIntyre. As we met with Judge McIntyre, I first advised his law clerk somewhat informally that I was concerned over the procedures, that it didn't appear to me that proper revocation had taken place. That at least according to the rules, and I think it's Rule 32, a hearing has to be held which would involve the taking of testimony under

oath, the opportunity to cross-examine, all this having notice ahead of time exactly, as I said, what the basis of the revocation is. Is it failing to report to a probation officer, failing to comply with conditions, or the new arrest? Then that hearing would be with live testimony, the opportunity to cross-examine, and then a decision by the Judge.

I somewhat informally notified the clerk that at least I was concerned about the court procedures that had taken place and the Judge's ruling, that

I was not completely sure that it was proper and within the guidelines that had happened.

In speaking with Mr. O'Malley we decided to pursue it on a somewhat informal course, and I filed I believe what would be called a motion to reduce sentence. This was filed the beginning of December in Judge McIntyre's Chambers. We had discussion it in his Chambers ahead of time.

Q. Eventually was Mr. Fisher released pursuant to that?

A. He was finally released in March in a posture of...in a sense awaiting a new

revocation proceeding. Judge McIntyre agreed to release him reinstating his probation, but without making a final decision that he had not completely violated it. The reason for that was that way a final hearing could be held from the Judge's point of view if Mr. Fisher didn't comply with everything he said he was going to do. The Judge had control.

Q. That would be Rule 32 of a hearing, or a Peters Two Hearing; is that correct?

A. That would be the hearing that was...it's actually

still to occur. It has not yet occurred.

. . . .

[p.141] CROSS-EXAMINATION BY MR. ALEXANDER:

. . . .

[p.142-143]

Q. The concept was to have some kind of cooperation between the court, the U.S. Attorney's Office and his counsel to allow Mr. Fisher to be free on bond to assist in narcotic investigations?

A. That's true. That's fairly common practice.

Q. But that was so?

A. Clearly.

Q. Mr. Fisher didn't tell you, did he not, that this had been sought previously, as far back as June of '80?

A. I knew that there was either work or negotiations that had gone on before, some from Mr. Fisher and some...I believe even Judge McIntyre alluded to it in the context that he wanted to be very sure that this was the co-operation that would be pursued and would be followed through on.

. . . .

[p.144] Q. Was any of Judge McIntyre's reference to Mr. Fisher's subsequent arrest?

A. In the pending uttering charge you mean?

Q. Yes.

A. That was quite naturally discussed in terms of...more

in general terms that the Judge quite naturally was concerned over releasing someone that did have a record as well as had pending charges. Primarily, as we said to the Judge, our main basis for release was his commitment to cooperate with the government.

. . . .

[p.148-151] PATRICK PATRISSI, having been duly sworn by the Chairman, was examined and testified as follows:

DIRECT EXAMINATION BY MR. ALEXANDER:

Q. State your full name, sir.

A. Patrick Patrissi,

P-a-t-r-i-s-s-i.

Q. Are you a member of the Bar of the District of Columbia?

A. Yes, I am.

Q. Did there come a time when you met Mr. Fisher?

A. Yes.

Q. Did you have an occasion to see him on more than one occasion?

A. Yes, I did.

Q. Do you recall his full name, sir?

A. Larry Fisher. I'm not sure if has a middle name.

Q. Where did you see Mr. Fisher and under what circumstances?

A. The first time I met Mr. Fisher was at a preliminary hearing which I attended for the purpose of having it continued.

Q. Do you recall when that was, sir?

A. I cannot recall the date.

Q. Was the matter continued?

A. Yes, it was.

Q. When did you next see Mr. Fisher?

A. The next time I saw Mr. Fisher was at a subsequent preliminary hearing that I attended with the respondent, Mr. Alexander.

Q. What was the final result of that matter on that occasion, sir?

A. The case was dismissed for want of prosecution.

Q. Do you recall whether there was some discussion as to

whether or not the case would be dismissed or continued?

A. I believe at that time there was a question that they were waiting for a witness, to see if a witness would appear. The government was waiting. They said he was on his way and they just had to wait a couple minutes or so and he'd be there. So I believe we waited like 15 minutes, and then they made another phone call and they said, well, he's still on his way but he's not here yet. We waited a little longer, and then finally the

respondent, Mr. Alexander, made a motion. After waiting a half hour, Mr. Alexander stated that he could not wait any longer because he had to get to another court. We had waited 45 minutes and he made a motion for dismissal and it was dismissed.

Q. Did you have an occasion to see Mr. Fisher thereafter, sir?

A. Yes, I did.

MR. LEFTWICH: You changed your word. Could you define what you mean by 'see'?

Q. Did there come a time when you personally met Mr. Fisher again, sir?

A. Yes.

Q. Where and when was that, sir?

A. I believe the next time I met Mr. Fisher was at the show cause hearing before Judge McIntyre.

Q. Did a hearing transpire?

A. Yes.

Q. Did you participate in the hearing, sir?

A. Yes, I did.

Q. Would you tell the Panel whether or not you made any statements or did you remain silent?

A. I made statements.

Q. What do you recall saying at that time sir?

A. Initially prior, immediately prior to the hearing when I met Mr. Fisher I asked him if there was anything I should know before I go into this hearing that might come up. He said he thought everything had been taken care of and he didn't know why he was here. I said, 'Is there anything I need to know?' He stated, 'No, I didn't do anything and it was supposed to be taken care of.'

Letter Of December 22, 1980 From Mr. Alexander To Bar Counsel

December 22, 1980

Honorable Fred Grabowsky
Bar Counsel
District of Columbia Bar
515 5th Street, N. W.
Building A
Washington, D. C. 20001

Re: Alexander/Bar Counsel
Docket No. 179-80

Dear Mr. Grabowksy:

It is unfortunate that I was not timely present before Judge Murphy on November 6 and November 7, 1980. The matter of Mr. Willie Alexander was scheduled for disposition on September 23, 1980, but was rejected by the prosecutor in Court. Thereafter, the matter was continued before Judge Doyle for disposition on October 7, 1980.

Mr. Willie Alexander reminds me and the jacket indicates that he had a flat tire on October 7, 1980, that he appeared late and the matter was continued "for trial" to November 6, 1980. My jacket does not reflect the new date received by Mr. Alexander, nor does any of my calendars. However, my calendars reflect that on October 7, 1980, I was in court in four (4) different matters: United States v. Hudson, M 2751-80; United States v. Love, No. F-2264-80;

and 54 Riggs Groups v. Joseph Murray, L & T No. 69455-80, in addition to Mr. Willie Alexander's matter. One matter, United States v. Hudson was in fact continued to November 6, 1980.

On November 6, 1980, the following cases appeared on my calendar, United States v. Hudson, M 2751-80; In Re: Charles Ware, Adult Ward - F 131-80; Paige v. Jackson, No. D 2652-78 and United States v. Ronnie Carter, Cr. No. F-1680-79. It is not disputed that Judge Murphy's clerk saw me on November 6, 1980, and as I now recall did in fact inform me that there was a case before Judge Murphy and that it was continued to the following day. At the time I was apparently on my way to another Court, in Paige v. Jackson, and at that time it was not convenient to make a note, and not having been provided with the name of the case, the incident slipped my mind.

On the morning of November 7, 1980, I had a matter in Superior Court, United States v. Elzy Law, scheduled for trial. However, Mr. Law entered a plea and the case was continued for sentencing. Subsequent, to this matter when checking in my with office, my secretary informed me that she had learned, while trying to get a matter continued with the Corporation Counsel's Office, that we had a matter before Judge Murphy on November 6, we had not appeared; the matter had been continued to November 7, and again we had not appeared. Upon receiving this information, the undersigned went to Judge Murphy's courtroom.

Unfortunately, the Willie Alexander matter did not appear on my calendars for either November 6 or November 7. The procedure in my office is that every morning my secretary is to notify the respective Judges' courtrooms or if necessary the Judges' Chambers of my schedule. This was not done on November 6 and 7 with Judge Murphy's clerk because the matter was never recorded in my office, either through inadvertency, or lack of knowledge of the court date.

It is not my practice nor my intention to disrupt the Judges by absenting myself when ordered to be present. The sequence of events in this unfortunate matter has not previously occurred as such. Because of my generally heavy schedule, I have not at all times been present at 9:00 a.m., 9:30 a.m., or 10:00 a.m., appointments with the respective Judges. However, as previously stated my checks with the various clerks have many more times than not reflected that my office has notified of my appearances in the respective courtrooms.

An associate, and member of the Bar, in my office has assisted me in many matters before the Court. Had November 6 and 7, been calendared, my associate could have assisted in this matter, in the event I was not available, as he has on numerous occasions. Moreover, had my office been notified on the morning of November 6, 1980, of the matter before Judge Murphy, my secretary would have sought to locate me; or she would have sent my Associate.

Once again, it is unfortunate this matter occurred. It was not in contempt, it was not due to disrespect or discourtesy, for this Court, nor any other Courts at any other times.

Sincerely,

Harry Toussaint Alexander

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	
versus	Criminal Action Number
LARRY C. FISHER,	42345-77
Defendant.	

Washington, D.C.
Monday, August 25th, 1980

The above-entitled action came on for a hearing before the Honorable FRED L. McINTYRE, Associate Judge, in Courtroom 37.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED IT REPRESENTS HIS ORIGINAL NOTES AND THE RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

MARGARET POLES, Esquire
Assistant United States Attorney

WILLIAM MORGAN, Probation Officer
Superior Court of the District of
Columbia

On behalf of the Defense:

PATRICK PATREECE, Esquire
Washington, D.C.

John Curley
Official Court Reporter

P R O C E E D I N G S

(11:00 a.m.)

THE DEPUTY CLERK: United States versus Larry C. Fisher, case jacket 42345-77 also in jacket F-373-78. Will the parties please identify themselves for the record.

MISS POLES: Margaret Poles, P-o-l-e-s, Assistant United States Attorney for the Government.

MR. MORGAN: William Morgan, Probation Officer.

MR. PATREECE: Patrick Patreece, Harry Tousaint Alexander's associate.

THE DEPUTY CLERK: Here for show cause.

THE COURT: All right. Let's see what is the status of Mister Fisher. What is his latest problem?

MR. MORGAN: Your Honor, Mister Fisher has several problems. One is he never brought proof of employment. Two, he has not enrolled in a drug treatment program as ordered by this Court. And, recently he failed to report on August the 20th and also failed to show for a show cause hearing.

THE COURT: You can be seated for a minute.

(Pasuse.)

THE COURT: What was the reason he didn't report to you the last time he was supposed to? Did he give any reasons?

MR. MORGAN: The last time was Friday, Your Honor.

THE COURT: Last time he was scheduled to report was on Friday.

MR. MORGAN: And he has given no reason.

THE COURT: Has he been tested for drugs during this probationary period?

MR. MORGAN: Not to my knowledge, Your Honor. He was supposed to be attending SAA. On our last hearing, Your Honor had ordered that the records be subpoenaed from SAA because they had not submitted his progress report.

THE COURT: Have you ever checked him or what is the situation? On that.

MR. MORGAN: Well, on one visit he admitted to me tha he had used drugs a week ago, and from time to time he came in looking like he was under the influence of drugs. Sometimes submitted to testing, sometimes he wouldn't.

THE COURT: I see.

MR. MORGAN: The time he admitted he used drugs was on July 28th.

THE COURT: Of this year?

MR. MORGAN: That is correct, Your Honor.

THE COURT: He is in no drug program now; is that correct?

MR. MORGAN: As far as I know he's not, Your Honor. He says that he is. He may be in SAA now, but there was some conflict with SAA when he was there. He refused to accept counseling. All he wanted to do was be tested.

THE COURT: All right, Counsel, anything you want to say in his behalf?

MR. PATREECE: Your Honor, first of all my client informs me on August 20th he did report, not to Mister Morgan but to another gentleman in the Probation Department. He said he filled out a

slip or form, because Mister Morgan was not there. He believes it was the 20th. One time he did not report. He was in court last week, on the 19th, and when he didn't report for this hearing on the 19th, was because purely due to confusion when he was supposed to appear because of the matters he's involved in. He has three other matters pending. In fact he was that morning in another matter that was dismissed. He didn't realize he had to come back at one-thirty for this hearing. Also, Mister Fisher has been in the hospital for approximately two weeks and the drug program, SAA Program, if you miss more than two or three days you are out. He was in the hospital for approximately two weeks. And he was hospitalized August first, he was released on the

11th. I have a copy of a medical report to that effect. He is gainfully employed at this period of time. This point in time. With the Gallery Growers, Grocers, 24th and Franklin, Northeast.

If it may please the Court, I will show you a copy of the original.

MISS POLES: May I see it, please?

MR. PATREECE: Would you like to see it?

(Pause.)

THE COURT: Anything else you want to say, or does he want to say anything, Counsel?

MR. PATREECE: One thing further, Mister Fisher has been cooperative with the police in his other matters. They are scheduled for disposition, for trial, I believe August 28, September 4,

September 30th and that there has been I believe a plea offer has been made and that we would, he has cooperated to the fullest with the police, we request that he be -- he continue on probation, at least until the disposition of these three matters.

May be a hearing could be rescheduled at the disposition of those three matters.

THE COURT: Anything else? Does he want to say anything?

MR. FISHER: Judge McIntyre, I was, I did report to Mister Morgan and he told me the day, the last time I was there, he told me if he wasn't there to see what is the guy next door to you, what is his name?

MR. MORGAN: Hutchins.

MR. FISHER: Hutchins. To see him. I did. I filled out the slip, gave it back. He in turn put another date on it. At that time I was in court. That is why I did not get back over there. I have been in the hospital, sick with "incarditis" and if you miss three days in SAA you have to re-enroll. I have been having to come to court. I haven't had time. You have to be there seven-thirty in the morning. I haven't had time to get up there to re-enroll because I had to be in court. Among other things I have been cooperating with the Police Department, helping them. That is about it.

THE COURT: Anything else?

MR. FISHER: No, sir.

THE COURT: Yes.

MISS FISHER: Yes, Your Honor, I would like to draw the Court's attention to the fact Mister Fisher is here on probation revocation, both technical and on a rearrest ground. On the technical ground with regard to reporting conditions. Mister Morgan stated on the date which he reported to another probation officer was August 15th, and not August 20th. The date that he did not report as scheduled was August 20th. And our records and the court records show that Mister Fisher was in court on August 19th, and not August 20th. Now, with regard to employment, the probation officer, Mister Morgan, can make representations to the Court, apparently they have been unable to verify the fact that he is employed; on June 26th of 1980 he was asked to bring his check stubs to

court, because Mister Fisher's conversation with the employer has been unsatisfactory with regard to verification.

On rearrest grounds, Your Honor, the Government has copies of the Gerstein proffers to show that he has had been arrested several times since he has been placed on probation. At this time he has three pending cases. One set for trial September 4th, one set for trial September 30th and the one scheduled for trial August 28th, already been continued to October 9th.

Your Honor, Mister Fisher has had two chances to maintain a satisfactory period of probation. The first chance when originally placed on probation, the second chance was in February of 1980 when His Honor amended the conditions of

that probation. At this time, the third chance, he has not yet been a satisfactory probationer.

The Government would recommend that his probation be revoked.

THE COURT: Anything else?

MR. PATREECE: Just Your Honor that granted, Mister Fisher may not have shown, supplied proof of employment, but I am sure he can do that, because he assures me he is working there, and he said he should be full-time shortly, and at the Gallery Grocers. Mister Fisher is involved in a lot of pending cases, a lot of different court dates. It seems easy to get confused when and where he is supposed to prepare for every court date. He was here once on the 19th, didn't really realize he had to be back the same date, a lot of things pending.

He was in the hospital, Your Honor. My client would like to bring to this Court this week proof of employment. Just respectfully request this be continued until the disposition of the three cases, since one, there was a fourth case that has already been dismissed. He's only been arrested in three, not convicted of any, of the three, and he will do his best to abide whatever the Court orders.

MISS POLES: Your Honor, there is one correction, he does have one conviction after being placed on probation, and the Government has a certified copy of the court jacket in that case.

THE COURT: All right, let me see it.

(Pause.)

MR. PATREECE: Your Honor, my client informs me that conviction was while he was in a half-way house, prior to probation.

(Pause.)

THE COURT: What is that again?

MR. PATREECE: He informs me that he was still enrolled in a half-way house at the time of that conviction. He wasn't on probation at that period of time.

THE COURT: He was on probation back in '78.

MR. PATREECE: Your Honor, my client would like to ---

THE COURT: This is '79.

MR. PATREECE: May my client address the Court for a minute?

MR. FISHER: Excuse me, Your Honor, when you sentenced me to probation, I

was already serving a sentence up in Danbury, in the federal court in Danbury, Connecticut. Two years. When you gave me this probation I in turn went back to Danbury, Connecticut for two years, once I became six months short of my release date, Danbury sent me to the half-way house. I was in federal custody doing federal time in the half-way house. Before released, returned to the half-way house for a night. They arrested me for saying I was trying to buy some sex, you know. No proof that I was. I was not on probation at that time. I was still in the half-way house. I was returning back to the half-way house, still doing two years on the federal sentence when you gave me the probation.

THE COURT: All right. Anything else you want to say?

(Pause.)

THE COURT: Mister Fisher, I just don't think you've been working out on your probation at all. You don't seem to have any type of employment and you haven't presented any type of documents which indicated that you are employed to the probation officer, you have had at least four arrests, and I don't know, you haven't even been to trail on three of those cases which are now pending in the court.

I just believe on the basis of that I am going to take you off your probation until you have disposed of these other cases and this will be the order of the Court.

After you have disposed of those other cases now pending in the Superior Court.

(11:13, a.m.)

CERTIFICATE OF REPORTER

I, John Curley, an Official Court Reporter for the Superior Court of the District of Columbia, hereby certify that the foregoing ten pages in the matter of UNITED STATES OF AMERICA versus LARRY C. FISHER, Criminal Action Number 492345-77, represents the transcript from my machine shorthand notes in this proceeding, heard in said Court Monday the 25th day of August, 1980.

In witness, I have subscribed my name, this the 28th day of May, 1981.

JOHN CURLEY
Official Court Reporter

SUPERIOR COURT OF
THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	
vs.	:	Criminal Action Number
LARRY C. FISHER,	:	F 3358-80
Defendant.	:	

Washington, D.C.
Wednesday, September 3, 1980

The above-entitled action came on for an arraignment before the Honorable GEORGE H. REVERCOMB, Associate Judge, in Courtroom Number 36, commencing at approximately 9:25 a.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HIS ORIGINAL NOTES AND RECORDS OF TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Government:

HAROLD CUSHENBERRY, Esquire
Assistant United States Attorney

On behalf of the Defendant:

HARRY TOUSSAINT ALEXANDER
Retired Judge
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Thomas Ronan
Official Court Reporter 727-1766

P R O C E E D I N G S

(9:25 a.m.)

THE DEPUTY CLERK: Judge, we can take Mr. Alexander's case.

THE COURT: All right. Call Judge Alexander's case. Let me have the jacket in the case. We learned yesterday for the first time that your client, Mr. Fisher, was in jail. It is on this case, a two thousand dollar bond.

MR. ALEXANDER: I am not sure, Your Honor, but it probably is. He has other counsel in another matter. I have a matter to take up with Judge McIntrye concerning him. It should not be in this case if he has not been arraigned.

THE COURT: It may have been set at presentment prior to the indictment.

MR. CUSHENBERRY: Your Honor, it indicated that a two thousand dollar bond, surety bond was set by Judge Goodrich at the time of presentment.

THE COURT: All right. At the time of the presentment. All right. Call the case, please, for arraignment.

THE DEPUTY CLERK: Your Honor, the matter before the Court this morning is the case of United States versus Mr. Larry Fisher for arraignment, F 3358-80. Your Honor, the gentleman is before the Court this morning on a one count indictment charging him with uttering. Counsel for the defendant is being furnished with copies of the indictment.
Mr. Alexander, do you wish a formal reading?

THE COURT: Do you wish a formal reading?

MR. ALEXANDER: No, Your Honor. We waive the formal reading and demand a jury trial. May I say for the record we intend to file a motion to dismiss for lack of speedy trial?

THE COURT: All right. The plea of not guilty should be entered at this time.

MR. ALEXANDER: Yes, Your Honor.

THE COURT: Plea of not guilty entered. Jury demand made. I will set it down for a status hearing and also we would like to have the motions filed within twenty days so that the Government can respond and at the status hearing, we can have a hearing or an argument on the motion that I am advised of. We can take up other

matters at the status hearing also. Motions for speedy trial should be heard prior to any trial date set. How much time would you like for? I usually set them six weeks as far as your discovery. I can set this a little earlier than that.

MR. ALEXANDER: Your Honor, will you indulge me a moment? Your Honor, six weeks is all right.

THE COURT: All right. We will set it for Friday, October the 17th. The bond has already been set in the case. I have not had an opportunity to review the reasons that it were set. Are there other matters pending against Mr. Fisher?

THE DEPUTY CLERK: Your Honor, Mr. Fisher in this case posted his bond but he is in jail on other charges.

MR. ALEXANDER: He has posted bond.

THE COURT: All right. He has posted so I want him to take a written notice and an oath to be administered so if he is released, that he will know about the failures to appear on October the 17th. Step forward, Mr. Fisher, and take the oath.

THE DEPUTY CLERK: Raise your right hand, sir, please. In the event that you're released from jail on your other charges, you have to appear back in this courtroom on October 17th, 1980, at nine a.m.. Failure to appear on that date and time, sir, the Court will issue a bench warrant for your arrest and you can be subject to a five thousand dollar fine, or five years in jail just for failing to appear. Do you understand that?

MR. FISHER: Yes.

THE COURT: Let the record reflect that he understands.

MR. ALEXANDER: Your Honor, I will ask an unusual privilege. There is some very important information that I should import to my client. There are really too many people back there to do so within ear shot. This kind of information should not be broken by the breach of a confidential relationship. May I very briefly talk to him in the corner?

THE COURT: Yes, sir.

MR. ALEXANDER: Thank you.

(Thereupon, the proceedings were concluded.)

CERTIFICATE OF REPORTER

I, Thomas J. Ronan, an Official Court Reporter for the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced, upon the arraignment in the case of UNITED STATES OF AMERICA v. LARRY FISHER, Criminal Action Number F 3358-80, in said Court, on the 3rd day of September, 1980.

I further certify that the foregoing 4 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes.

In witness whereof, I have hereinto subscribed my name, this the 11th day of August, 1981.

Official Court Reporter

U.S. Constitution

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

D.C. Code

§ 11-2502. Censure, suspension, or disbarment for cause.

The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with his application or admission is sufficient cause for the revocation by the court of his admission.

§ 11-2503. Disbarment upon conviction of crime; procedure for censure, suspension, or disbarment.

. . . .

(b) Except as provided in subsection (a), a member of the bar may not be censured, suspended, or expelled under this chapter until written charges, under oath, against him have been presented to the court, stating distinctly the grounds of complaint. The court may order the charges to be filed in the office of the clerk of the court and shall fix a time for hearing thereon. Thereupon a certified copy of the charges and order shall be served upon the member personally, or if it is established to the satisfaction of the court that personal service cannot be had, a certified copy of the charges and order shall be served upon him by mail, publication, or otherwise as the court directs. After the filing of the written charges, the court may suspend the person charged from practice at its bar pending the hearing thereof.

Bar Rule XI

Section 4. The Board on Professional Responsibility.

(1) The Court shall appoint a board to be known as the "Board on Professional Responsibility" (hereinafter referred to as the Board) which shall consist of 7 members of the Bar of the District of Columbia and 2 members who are not lawyers. The attorney members shall be

appointed from a list submitted by the Bar containing the names of not fewer than 3 active members of the Bar for each attorney vacancy to be filled. The non-lawyer members shall be selected by the Court. In appointing non-lawyer members, the Court shall consider, but not be limited to, nominees whose names are submitted to the Court in writing by the Bar or by any other organization (voluntary bar or otherwise) or individual. One of the attorney members shall be designated by the Court as Chairman of the Board and another as Vice-chairman to act in the absence or disability of the Chairman.

. . . .

(3) The Board shall have the power and duty:

(a) To consider and investigate any alleged ground for discipline or alleged incapacity of any attorney called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effect the purposes of these disciplinary rules.

. . . .

(c) To appoint 2 or more hearing committees, each committee consisting of 3 members, of whom at least 2 must be members of the Bar of the Dostrict of Columbia, to conduct hearings into formal charges of misconduct, and to submit their findings and recommendations, together with the record, to the Board.

. . . .

(e) To review, upon application by Bar Counsel, a determination by a hearing committee that a matter should be concluded by dismissal or by informal admonition without the institution of formal charges.

. . . .

(g) To review the findings and recommendations of hearing committees with respect to formal charges and to prepare and forward its own findings and recommendations, together with the record of the proceeding before the hearing committee and the Board, to this Court.

. . . .

Section 5. Hearing committees.

(1) Each hearing committee shall consist of 3 members, at least 2 of whom must be members of the Bar of the District of Columbia. When a hearing committee is first selected, 1 of its members shall be appointed for a term of 1 year, another member for a term of 2 years, and the 3rd member for a term of 3 years. Thereafter, all regular terms shall be for 3 years, and no member shall serve for more than 2 successive 3-year terms. Upon the completion of a regular term, a member shall continue to serve until a successor is appointed. A member who has served 2 successive 3-year terms may be reappointed after the expiration of 1 year. The attorney

member of the committee senior in service (or, in the case of a new committee, senior in membership in the Bar) shall be its Chairman. The committee shall act only with a concurrence of a majority of its members; provided, however, that 2 members shall constitute a quorum. If 1 or more members of a hearing committee cannot be present at a hearing scheduled by that committee, members of other hearing committees may serve, pro hac vice, upon designation by the Chairman.

(2) Hearing committees shall have the power and duty:

(a) Through the member assigned by the Board pursuant to paragraph (3)(d) of section 4 of this Rule to review and approve or modify recommendations by Bar Counsel for dismissals, informal admonitions, and the institution of formal charges. In the event of a disagreement between Bar Counsel and the reviewing member, the case shall be referred to the full committee of which the attorney is a member for a probable cause hearing. If that committee finds probable cause, it shall refer the matter to the Chairman of the Board for assignment to another hearing committee for a formal hearing. If that committee does not find probable cause, it shall dismiss the action subject to the right of Bar Counsel to seek review of such ruling by the Board.

(b) To conduct hearings into formal charges of misconduct upon assignment by the Chairman of the Board.

(c) To submit their findings and recommendations, together with the record of the hearing, to the Board.

. . . .

Section 7. Procedure.

(2) Formal hearing. The hearing committee shall in every case submit a report containing its findings and recommendation, together with a record of its proceedings and briefs, if any were submitted, to the Board within 60 days after the conclusion of its hearing. In the event of a hearing committee's noncompliance with this provision, the Board, in its discretion, may so advise the Court and request intercession by the Court.

(3) Review by the Board and Court. Upon receipt of a report from a hearing committee, the Board shall set the dates for submission of briefs and for oral argument before the Board. If neither the respondent nor Bar Counsel objects to the findings and recommendation of the hearing committee, oral argument and the submission of briefs may be waived by stipulation, subject to the approval of the Board. The Board shall promptly after the conclusion of oral argument or waiver thereof either affirm or modify the recommendation of the hearing committee, or dismiss the petition. In the event the Board determines that the proceeding shall be concluded by reprimand, it shall instruct Bar Counsel to so notify the respondent in writing.

Unless the Board shall dismiss or remand the petition or the matter is concluded by reprimand, the Board shall promptly submit a report containing its findings and recommendation, together with the entire record, to the Court. After the filing of the report, a copy thereof shall be served on the respondent. The respondent may file exceptions to the report within 20 days from the date of service of a copy thereof, or within an additional period not to exceed 20 days granted by this Court for good cause shown.

. . . .

If exceptions to the report are filed by the respondent, the Court shall schedule the matter for the submission of briefs and oral argument in accordance with the general rules governing civil appeals. Upon conclusion of the proceedings, or upon consideration of the report if no exceptions thereto are filed by the respondent, the Court shall enter an appropriate order as soon as the business of the Court permits. In considering the appropriate order, the Court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record, and shall adopt the recommended disposition of the Board unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted.

Board on Professional Responsibility Rules

Chapter 10

Conduct of Hearings

10.4 Standard of Proof

Except as provided in Section 7(1) of Rule XI of the Rules Governing the Bar concerning probable cause, Bar Counsel shall have the burden of proving violations of disciplinary rules by clear and convincing evidence.

Chapter 12

Formal Proceedings before Board on Professional Responsibility

12.6 Final Board Action and Review Standards

Upon conclusion of the oral argument or its waiver, the Board may affirm, modify, or expand the findings and recommendation of the Hearing Committee. Alternatively, the Board may remand the matter of the Hearing Committee for further proceedings, or the Board may dismiss the petition. Review by the Board shall be limited to the evidence presented to the Hearing Committee, except in extraordinary circumstances determined by the Board. When reviewing the findings of a Hearing Committee, the Board shall employ a "substantial evidence on the record as a whole" test. When making its own findings of fact, the Board shall employ a "clear and convincing evidence" standard.

END OF DOCKET